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Supreme Court, U.S.
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No. 97-1147

In the

Supreme Court of the United States

October Term, 1997

STATE OF MINNESOTA,

Petitioner,

vs.

WAYNE THOMAS CARTER, AND
MELVIN JOHNS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE MINNESOTA SUPREME COURT

JOINT APPENDIX

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STATE of Minnesota, Respondent,

v.

Wayne Thomas CARTER,
petitioner, Appellant.

No. CX-95-1368.

Supreme Court of Minnesota.

Sept. 11, 1997.

Following denial of his motion to suppress, defendant was convicted, in the District Court, Dakota County, Mary E. Pawlenty, J., of controlled substance offenses. Defendant appealed. The Court of Appeals, 545 N.W.2d 695, Davies, J., affirmed. Defendant again appealed. The Supreme Court, Tomljanovich, J., held that: (1) defendant had standing to assert unconstitutionality of search of premises not under his control; (2) officer's observations of interior of apartment constituted "search" for Fourth Amendment purposes whether or not made from apartment's curtilage; and (3) search was not reasonable.

Reversed.

Stringer, J., dissented with opinion in which Keith, C.J. and Blatz, J., joined.

1. Criminal Law 🔑 1139

Supreme Court reviews *de novo* district court's denial of motion to suppress, where facts of case are not in dispute.

2. Criminal Law 🔑 394.5(2)

Criminal defendant seeking to suppress evidence on basis that it was obtained in violation of Fourth Amendment must show that he or she is proper party to assert claim of illegality and to seek remedy of exclusion, and must demonstrate: that he or she has adversary interest in outcome; and that such adverse interest is based upon alleged violation of defendant's rights, rather than violation of rights of some third party. U.S.C.A. Const.Amend. 4.

3. Searches and Seizures 🔑 162

For purpose of ascertaining standing to challenge constitutionality of search, defendant must show possessory interest in items seized and expectation of privacy in areas searched. U.S.C.A. Const.Amend. 4.

4. Searches and Seizures 🔑 164

For purpose of ascertaining standing to challenge constitutionality of search. defendant against whom allegedly illegally obtained evidence is being offered qualifies as one who has adversary interest. U.S.C.A. Const.Amend. 4.

5. Searches and Seizures 🔑 162

Question of whether defendant challenging constitutionality of search is alleging adverse interest based upon his or her own rights or those of third party turns on determination of whether disputed search infringed interest of defendant which Fourth Amendment was designed to protect; such interest exists where person who claims constitutional protection has legitimate expectation of privacy in invaded place. U.S.C.A. Const.Amend. 4.

6. Searches and Seizures 🔑 162

For purpose of ascertaining standing to challenge constitutionality of search, defendant has "legitimate

expectation of privacy" in premises searched, as required to establish violation of his individual Fourth Amendment right, where his subjective expectation of privacy is one that society is prepared to recognize as reasonable; defendant must show both subjective expectation of privacy and that, under totality of circumstances, this expectation was reasonable in light of longstanding social customs that serve functions recognized as valuable by society. U.S.C.A. Const.Amend. 4.

See publication Words and Phrases for other judicial constructions and definitions.

7. Searches and Seizures 🔑 164

Defendant observed by police, through gap in closed blinds of acquaintance's apartment, preparing cocaine for distribution, had standing to assert unconstitutionality of search; defendant's subjective expectation of privacy was evidenced by fact that he was observed inside apartment of acquaintance with doors shut and blinds drawn, and defendant was type of person who possessed legitimate expectation of privacy in apartment. U.S.C.A. Const.Amend. 4.

8. Searches and Seizures 🔑 162

For purpose of ascertaining standing to challenge constitutionality of search, legitimacy of defendant's expectation of privacy in prentises not under his control does not depend upon defendant's status as "guest" in any formal sense, but rather upon whether status actually enjoyed by defendant is type of longstanding social custom that serves functions recognized as valuable by society. U.S.C.A. Const.Amend. 4.

9. Searches and Seizures 🔑 164

Defendant had leaseholder's permission to be in apartment, worked in concert with leaseholder on common task of dividing and packaging cocaine, and remained in

apartment for at least two and a half hours had standing to challenge constitutionality of search. U.S.C.A. Const.Amend. 4; M.S.A. Const. Art. 1, § 10.

10. Searches and Seizures 🔑 162

For purpose of ascertaining whether particular defendant's possesses legitimate expectation of privacy in searched premises not under his control, society recognizes as valuable right of property owners or leaseholders to invite persons into privacy of their homes to conduct common task, be it legal or illegal activity. U.S.C.A. Const.Amend. 4.

11. Searches and Seizures 🔑 13.1

For constitutional purposes, "search" occurs whenever government agents intrude upon area in which person has reasonable expectation of privacy. U.S.C.A. Const. Amend. 4.

See publication Words and Phrases for other judicial constructions and definitions.

12. Searches and Seizures 🔑 17

Fact that police officer was arguably standing outside curtilage of multiple-unit dwelling at time he observed illegal activity occurring inside apartment was insufficient, without more, to establish that his observations were not "search" for Fourth Amendment purposes; focus of curtilage test was area observed rather than area in which officer was standing, and fact that officer was outside curtilage did not eliminate occupant's expectation of privacy within interior of apartment. U.S.C.A. Const.Amend. 4.

13. Searches and Seizures 🔑 17

Not all instances in which police officer looks into interior of house or apartment constitute "search" under Fourth Amendment; fundamental question is whether looking

intruded upon justified expectation of privacy of occupant, which in turn ordinarily requires consideration of location of officer at time of viewing and precise manner in which view was achieved. U.S.C.A. Const.Amend. 4.

14. Searches and Seizures 🔑 26

That which person knowingly exposes to public, even in his own home or office, is not subject to Fourth Amendment protection; Fourth Amendment does not protect activities easily observable by general public. U.S.C.A. Const.Amend. 4.

15. Searches and Seizures 🔑 17

For purpose of determining whether police officer's observations of interior of apartment constituted "search" for Fourth Amendment purposes, apartment leaseholder and others present in apartment did not knowingly expose their activities to public, where apartment blinds were drawn and officer had to take extraordinary measures to be able to observe activities within from outside. U.S.C.A. Const.Amend. 4.

16. Searches and Seizures 🔑 17

Police officer's observations of interior of apartment constituted "search" for Fourth Amendment purposes, whether or not officer was outside building's curtilage at time he made them; apartment leaseholder and others present in apartment did not knowingly expose their activities to public, and officer had to leave sidewalk, walk across grass, climb over bushes, crouch down and place his face 12 to 18 inches from the window to observe activities within. U.S.C.A. Const. Amend. 4.

17. Searches and Seizures 24, 40.1

For search to be reasonable under Fourth Amendment, police must have both probable cause and search warrant. U.S.C.A. Const.Amend. 4.

18. Arrest 63.4(1)

Searches and Seizures 44

Police may constitutionally make warrantless arrests, entries and searches of dwellings if they can demonstrate existence of probable cause and exigent circumstances. U.S.C.A. Const.Amend. 4.

19. Searches and Seizures 23

Conduct that would constitute illegal search does not become something less merely because police had reasonable suspicion and embarked on a search of limited intrusiveness; fact that officer reasonably expected to find evidence and used least intrusive means possible to achieve that end is insufficient to sustain warrantless search. U.S.C.A. Const.Amend. 4.

20. Drugs and Narcotics 185(2)

Search consisting of police officer's observations through blinds covering window of apartment was not "reasonable search" within meaning of Fourth Amendment, despite contention that officer had reasonable basis for believing occupants of apartment were engaged in drug activity and that search was minimally intrusive, where officer lacked either probable cause to obtain search warrant or warrant itself. U.S.C.A. Const.Amend. 4.

See publication Words and Phrases for other judicial constructions and definitions.

Syllabus by the Court

1. A person who had permission from the leaseholder to be in an apartment, collaborated with the leaseholder on a common task while in the apartment, and remained in the apartment for 2 1/2 hours, had standing to challenge the legality of a search of that apartment under the Fourth Amendment to the United States Constitution, and Article I, Section 10 of the Minnesota Constitution.

2. It was a search when a police officer stepped off the sidewalk, walked across the grass, climbed behind some bushes, and looked into a ground floor apartment by peering through a gap in the closed window blinds from a distance of 12 to 18 inches.

3. Because the officer had neither probable cause nor a warrant, his search of the apartment was unreasonable.

Scott Swanson, Assistant State Public Defender, Minneapolis, for Appellant.

Hubert H. Humphrey III, Attorney General, St. Paul, James C. Backstrom, Dakota County Attorney by Phillip D. Prokopowicz, Assistant Dakota County Attorney, Hastings, for Respondent.

Heard, considered and decided by the court en banc.

OPINION

TOMLJANOVICH, Justice.

By looking through the gaps in the closed blinds covering a window, a police officer observed the appellant, Wayne Thomas Carter, as he engaged in a drug-packaging operation with two other persons, one of whom was the leaseholder of the apartment. The district court held that Carter, who was an

out-of-state visitor, did not present any evidence to establish his standing to contest the legality of the observation. The court also concluded that the officer did not conduct a search because he made the observations from an area where Carter did not have a reasonable expectation of privacy. The court of appeals affirmed the district court, but based its holding only on the finding that Carter did not have standing to bring a motion to suppress any evidence obtained from the officer's observations. We reverse, and hold that the evidence was sufficient to establish that Carter had standing to challenge the legality of the observation. We further hold that the officer's observation rose to the level of a search, and that the officer's lack of probable cause and a warrant rendered the search unreasonable under the Fourth Amendment of the United States Constitution, and Article I, Section 10 of the Minnesota Constitution.

At approximately 8 p.m. on the evening of May 15, 1994, an anonymous informant approached Eagan police officer Jim Thielen. The informant, whom Thielen never had seen before, told Thielen that he/she[1] had walked by apartment 103 at 3943 South Valley View Drive and observed people sitting around a table inside the apartment "bagging" a white powder. The informant also told Thielen that he/she believed the occupants of the apartment had used a blue four-door Cadillac located in the parking lot adjacent to the apartment complex. The informant also told Thielen that the car had an Illinois license plate that read SGD 896. In response to this information, Thielen went to the complex and approached the ground floor window of apartment 103. Thielen then walked toward the window of the apartment by leaving the common sidewalk that leads to the apartment building's entrance and

[1] Thielen testified at the omnibus hearing that he spoke with the confidential informant for 15 to 25 minutes. He gave no further detail, however, about what their conversation involved, stating that to do so would reveal the informant's identity.

stepping on a grassy common area closer to the window. Thielen then walked behind some short bushes located in front of the apartment window and stood approximately 12 to 18 inches from the window. The windows blinds were drawn closed, but gaps in the blinds allowed Thielen to observe activity in the apartment. While looking through the gaps in the blinds, Thielen observed two males and one female sitting at a kitchen table. One of the males appeared to be placing a white powdery substance onto the kitchen table. This person then would pass the white substance to the second male who then would place the powder into a plastic bag. The second male, who was wearing bedroom slippers, would in turn give the plastic bag to the female who would cut off the ends of the bag and place it on the table.

After observing this activity for approximately 15 minutes, Thielen left the apartment complex and went to a nearby fire station where he had another conversation with the informant and another Eagan police officer. At this time the informant told the officers that the people inside the apartment might be in possession of a gun. Thielen then returned to the apartment complex where he located a Cadillac matching the description given by the informant. He then returned to the fire station, telephoned Officer Kevin Kallestad of the South Metro Drug Task Force, and reported what he had seen. Kallestad instructed Thielen to stop and secure the suspect vehicle should anyone attempt to drive it away. Police also began to prepare affidavits as part of a request for warrants to search both the apartment and the Cadillac.

At approximately 10:30 p.m., an Eagan police officer observed two males putting items into the suspect Cadillac. The two males then entered the vehicle and started to drive it out of the parking lot. As per instructions, Eagan police stopped the vehicle at the intersection of Rahn Road and Beau de Rue Drive. The police found Carter in the driver's seat and

Melvin Johns in the passenger's seat. The police ordered both men out of the car. As the police opened the door to let Johns out of the car, they observed a black zippered pouch and a handgun, later determined to be loaded, on the floor of the vehicle. The police then placed Carter and Johns under arrest. The police subsequently towed the Cadillac to the Eagan Police Department, and after receiving the signed search warrant at approximately 1:30 a.m. on May 16, the police searched the vehicle. When the officers opened the black zippered pouch, they discovered a white mixture in plastic baggies, Johns' identification, pagers, and a scale. Tests later determined that the white mixture was 47.1 grams of cocaine.

Late in the evening of May 15, after the arrests of Carter and Johns, Eagan police returned to apartment 103 and arrested its occupant, Kimberly Thompson.[2] At approximately 3 a.m. on May 16, police executed a search warrant on the apartment and located cocaine residue on the kitchen table and plastic baggies consistent with those found in the automobile driven by Carter. Thielen subsequently identified Carter, Johns and Thompson as the individuals he had observed in the apartment packaging the white mixture. He identified Carter as the individual he had seen putting the white mixture on the table and dividing it into piles, Johns as the man who wore slippers and placed the piles into baggies, and Thompson as the individual who cut the ends off the baggies and placed the baggies in piles. Police ultimately learned that Carter and Johns were residents of Chicago, Illinois, and that Thompson was the sole lessee of apartment 103. Subsequent to his arrest, Carter made a statement to the police in which he admitted ownership of a duffel bag found inside the Cadillac. A search of the duffel bag uncovered a digital gram scale containing traces and residue of cocaine.

[2] Thompson was a co-defendant in the omnibus hearing. She subsequently pled guilty and is not a party to this appeal.

Johns made a statement to the police admitting he had accepted a proposal to transport cocaine from Illinois to Minnesota for money, and that he, Carter and Thompson had packaged the cocaine at Thompson's apartment. He also admitted that there were approximately two ounces of crack cocaine and a handgun in the vehicle.

Carter, Johns and Thompson made motions through joint counsel to suppress their statements and all evidence seized from both the apartment and the Cadillac. They argued, among other things, that Thielen's initial observation through the window of Thompson's apartment was an unreasonable search under the Fourth Amendment and that all evidence obtained as a result of those observations should be excluded as fruit of the poisonous tree. After a two-day omnibus hearing, the district court denied the motions to suppress of Carter and Johns. The court held that the two defendants did not have standing to challenge Thielen's observations through Thompson's window because both defendants failed to present evidence that their expectations of privacy in the apartment were based upon "understandings that are recognized and permitted by society." *See Rakas v. Illinois*, 439 U.S. 128,143-44 n. 12, 99 S.Ct. 421, 430 n. 12, 58 L.Ed.2d 387 (1978); *see also Minnesota v. Olson*, 495 U.S. 91, 110 S.Ct. 1684, 109 L.Ed.2d 85 (1990). In particular, the court noted that the only evidence presented by the defense showed that the two defendants were out-of-state residents who had been at the apartment for a period of time on May 15, 1994. The district court also concluded that Thielen's observation was not a search within the meaning of the Fourth Amendment because the officer made his observation from an area in which the defendants had no reasonable expectation of privacy.

Following the district court's denial of their motions to suppress, Carter and Johns proceeded with separate counsel. The district court tried Carter on stipulated facts and found

him guilty of conspiracy to commit a controlled-substance crime in the first degree and aiding and abetting a controlled-substance crime in the first degree. Minn. Stat. § 152.021, subd. 1(1), subd. 3(a) (1996); Minn. Stat. § 609.05 (1996). The district court denied Carter's request for a downward departure and sentenced him to 86 months. Carter appealed his conviction, challenging the legality of Thielen's observations through Thompson's apartment window. The court of appeals held that Carter did not have standing to object to Thielen's actions because Carter's claim that he was predominantly a social guest was "inconsistent with the only evidence concerning his stay in the apartment, which indicates that he used it for a business purpose–to package drugs." *State v. Carter*, 545 N.W2d 695, 698 (Minn.App.1996).

We therefore begin our analysis by addressing the question of standing, and only if we determine that Carter had standing to bring a motion to suppress evidence recovered as a result of Thielen's observation of the apartment, will we address the legality of Thielen's actions–whether his observation qualified as a search, and if it did, whether it was reasonable.

I. Standing

[1-5] Because the facts of this case are not in dispute, we will review de novo the district court's denial of Carter's motion to suppress. *State v. Othoudt*, 482 N.W.2d 218, 221 (Minn.1992). Before a criminal defendant can bring a motion to suppress evidence on the basis that it was obtained in violation of the Fourth Amendment, the defendant must show that he or she is a proper party to assert the claim of illegality and to seek the remedy of exclusion. To establish such a showing, a party must demonstrate two things: First, that he or she has an adverse interest in the outcome. *Baker v. Carr*, 369 U.S. 186, 204, 82 S.Ct. 691, 702, 7 L.Ed.2d 663

(1962). And second, that the adverse interest is based upon an alleged violation of the rights of the individual, rather than the violation of the rights of some third party. *Jones v. United States*, 362 U.S. 257, 261, 80 S.Ct. 725, 731, 4 L.Ed.2d 697 (1960)(overruled on other grounds).[3] As far as the first factor is concerned, a criminal defendant against whom the allegedly illegally obtained evidence is being offered surely qualifies as one who has an adversary interest. *See* 5 Wayne R. LaFave, *Search and Seizure* § 11.3, at 117 (3d ed.1996) (hereinafter LaFave). Consequently we hold that Carter had an adversarial interest in the outcome. The analysis of the second factor is not so easily decided, however. As the United States Supreme Court has told us, the question turns on a "determination of whether the disputed search * * * has infringed an interest of the defendant which the Fourth Amendment was designed to protect." *Rakas*, 439 U.S. at 140, 99 S.Ct. at 429. Such an interest exists when "the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place." *Id.* at 143, 99 S.Ct. at 430. The question before us, therefore, is whether Carter had a legitimate expectation of privacy in Thompson's apartment.[4]

[6] A defendant has a legitimate expectation of privacy when his or her subjective expectation of privacy is "one that

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[3] *Jones* was being interpreted as establishing "automatic standing" to challenge the legality of a search for any persons charged with crimes of possession. *United States v. Salvucci*, 448 U.S. 83, 83, 100 S.Ct. 2547, 65 L.Ed.2d 619 (1980). *Salvucci* overruled this holding to establish that the defendant must show a possessory interest in the items seized and an expectation of privacy in the areas searched to establish that he/she had standing to challenge the legality of a search. *Id.*

[4] The district court found that Carter had no expectation of the privacy in the area from which Thielen observed the illegal activity. As we will discuss *infra* in Section II, however, the proper question is whether Carter had an expectation of privacy in the area into which Thielen was looking–namely the inside of the apartment.

society is prepared to recognize as 'reasonable.'" *Id.* at 143-44 n. 12, 99 S.Ct. at 430 n. 12 (quoting *Katz v. United States*, 389 U.S. 347, 361, 88 S.Ct. 507, 516, 19 L.Ed.2d 576 (1967)(Harlan, J., concurring)). In other words, a criminal defendant must make two showings to establish that he or she based the motion to suppress upon an alleged violation of his or her individual Fourth Amendment right. First, he or she must show a subjective expectation of privacy, and second, he or she must show that this expectation was reasonable in light of "longstanding social customs that serve functions recognized as valuable by society." *Olson*, 495 U.S. at 98, 110 S.Ct. at 1689.

[7] In the case at bar, it is clear that Carter had a subjective expectation of privacy. He was inside the apartment of an acquaintance with the doors shut and the blinds drawn. The more difficult question is whether Carter's expectation was legitimate, that is, whether the expectation was the type that society is prepared to recognize as reasonable. Both the district court and court of appeals concluded that Carter failed to establish that his subjective expectation was legitimate. The district court based its conclusion on the fact that Carter offered no evidence that his status in relation to the apartment was similar to the status of the defendant in Olson, or that his status was such that it provided a legitimate expectation of privacy in the apartment. Likewise, the court of appeals based its conclusion on the fact that Carter's claim that he was a social guest was inconsistent with the "only evidence concerning his stay in the apartment, which indicates that he used it for a business purpose * * * ." *Carter*, 545 N.W.2d at 698. In both cases, the courts focused on the facts of *Olson*, a case in which there was no dispute that the criminal defendant was an overnight guest of the person who had the possessory interest of the searched

residence.[5] By comparison, it is undisputed that Carter failed to produce any evidence that he was a "guest" of Thompson's, let alone an "overnight guest." But a closer reading of *Olson* reveals that the Supreme Court does not require a person to establish his or her status as either a guest or overnight guest before that person can prove a legitimate expectation of privacy in a location that is searched. Instead, the person must establish only that under the totality of the circumstances, the person's subjective expectation was the type of expectation that "society is prepared to recognize as 'reasonable.'"

[8] Admittedly, such a test is a difficult, one to define, let alone apply. But the Supreme Court's own words offer guidance. "To hold that an overnight guest has a legitimate expectation of privacy in his host's home merely recognizes the everyday expectations that we all share. Staying overnight in another's home is a longstanding social custom that serves functions recognized as valuable by society." *Olson*, 495 U.S. at 98, 110 S.Ct. at 1689. In other words, the Court in *Olson* did not recognize the expectation of privacy as legitimate

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[5] The issue of whether a defendant has standing to assert a violation of the Fourth Amendment has a long and muddled history. Throughout the first half of this century, courts decided standing by using common-law concepts of private property. Courts generally found those individuals who had an ownership interest, a leasehold, or "dominion and control" over the searched property to have standing to contest a search of the property. Courts, meanwhile, found that mere "guests" and "invitees" did not have such standing. *Jones*, 362 U.S. at 265-66, 80 S.Ct. at 733 (citations omitted). The Supreme Court rejected this property-based approach in favor of a broad rule that allowed "anyone legitimately on the premises where a search occurs" to challenge its legality by way of a motion to suppress. *Id.* at 267, 80 S.Ct. at 734. The Court later retreated from the "legitimately on the premises" test. *Rakas*, 439 U.S. at 128, 99 S.Ct. at 423. The Court in *Rakas* held that the mere fact that an individual was "legitimately on the premises" was insufficient to give that person standing to contest a search of another's dwelling place. *Id.* at 143, 99 S.Ct. at 430.

merely because the criminal defendant was a *guest*. *See* 5 LaFave, *supra*, § 11.3(b), at 137 (stating that the Court's decision lends "considerable support to the claim that shorter term guests also have standing").[6] Rather, it recognized the defendant's expectation of privacy as legitimate because the criminal defendant's status as a guest was the type of longstanding social custom that serves functions recognized as valuable by society. As the Court went on to state: "The point is that hosts will more likely than not respect the privacy interest of their guests, who are entitled to a legitimate expectation of privacy despite the fact that they have no legal interest in the premises and do not have the legal authority to determine who may or may not enter the household." *Olson*, 495 U.S. at 99, 110 S.Ct. at 1689. Consequently, if Carter had established that his status is the type that serves functions recognized as valuable by society, his expectation of privacy would have been legitimate.

[9, 10] The stipulated facts show that the apartment's leaseholder allowed Carter and Johns into her apartment for the purpose of packaging cocaine in exchange for one-eighth ounce of cocaine; that Thielen observed all three persons

[6] Many other courts have concluded that *Olson* does not require a criminal defendant to prove his or her status as a guest to establish a legitimate expectation of privacy. *See, e.g., Hill v. United States*, 664 A.2d 347, 352 (D.C. 1995) ("To be sure, being an overnight guest is not the sole means by which one may claim an expectation of privacy in another's home.") (citations omitted); *Davis v. State*, 582 So.2d 61, 61 (Fla.Dist.Ct.App. 1991) ("*Olson* does not necessarily deny standing to one whose status in a residence is less than that of an overnight guest."); *State v. Wright*, 119 N.M. 559, 893 P.2d 455, 459 (N.M.Ct.App.1995) ("[W]e do not read *Olson* to make an individual's overnight status as a houseguest a precondition to the right to assert an invasion of a reasonable expectation of privacy under the Fourth Amendment to the United States Constitution."); *State v. Ackerman*, 499 N.W.2d 882, 884 (N.D.1993) ("[M]uch of the reasoning underlying the Supreme Court's finding of standing on the part of an overnight guest would support standing on the part of other guests, as well * * *.").

inside the apartment as they collaborated to divide and package the cocaine; that Carter and Johns remained inside the apartment for at least 2 1/2 hours, and that Johns was wearing bedroom slippers while inside the apartment.[7] Although we recognize that these facts probably fail to establish Carter as a "guest" of the apartment's leaseholder, we conclude that they were sufficient to prove that Carter was the type of person who possessed a legitimate expectation of privacy in the apartment. After all, Carter had the leaseholder's permission to be inside the apartment.[8] He remained inside the apartment for at least 2 1/2 hours, during which time he worked in concert with the leaseholder on a common task.[9] Whether these facts establish Carter as a

[7] Carter offered evidence of Johns' slippers to show that the two were so comfortable inside the apartment that they must have been guests. While recognizing the relevance of such a fact, we refuse to place a great deal of constitutional significance on a person's footwear. It is interesting to note, however, that another court recently found a lack of standing in part on the fact that one of the defendants "was feigning sleep while fully dressed and wearing *shoes*." *Hill v. United States*, 664 A.2d 347, 350 (D.C. 1995) (emphasis added).

[8] Although the fact that a person is legitimately on the premises is not by itself sufficient to establish standing, *Rakas*, 439 U.S. at 142, 99 S.Ct. at 429, it is important to note that a person who is not legitimately on the premises cannot have standing, 5 LaFave, *supra*, § 11.3(b), at 143. Courts also have concluded that "a showing that a person authorized to do so gave permission for the defendant to be present on that particular occasion" was sufficient to establish the fact that the defendant was legitimately on the premises. *Id.* at 144, 99 S.Ct. at 431

[9] Many courts have denied standing where it is apparent that the party alleging the illegal search was on the property very briefly or had only a minimal connection to the property or the host. *See, e.g., United States v. McNeal*, 955 F.2d 1067 (6th Cir.1992) (finding no legitimate expectation of privacy where defendant stated he had stopped by the host's home only to use the telephone); *Prophet v. United States*, 602 A.2d 1087 (D.C. 1992) (finding no standing where defendant had been at his friend's house for only 3 or 4 minutes prior to the police's entry); *Davis v. State*, 582 So.2d 61 (Fla.Dist.Ct.App.1991) (finding no legitimate expectation of

visitor, invitee or business partner does not matter. As the Court has carefully noted, arcane distinctions developed in property and tort law between guests, licensees, invitees, and the like do not control. *Jones*, 362 U.S. At 266, 80 S.Ct. at 734. What does control, however, is the nature of the relationship between the property possessor and the person alleging the privacy interest in the property. If the relationship is the type that society recognizes as valuable, then we will find standing. If it is not, then we will not. Although society does not recognize as valuable the task of bagging cocaine, we conclude that society does recognize as valuable the right of property owners or leaseholders to invite persons into the privacy of their homes to conduct a common task, be it legal or illegal activity. We, therefore, hold that Carter had standing to bring his motion to suppress the evidence gathered as a result of Thielen's observations.

II. The Search

[11, 12] Having determined that Carter had standing to assert a violation of the Fourth Amendment, we now turn to the question of whether Thielen's observation constituted a search. A search occurs whenever government agents intrude upon an area where a person has a reasonable expectation of privacy. *California v. Ciraolo*, 476 U.S. 207, 211, 106 S.Ct. 1809, 1811, 90 L.Ed.2d 210 (1986) (citing *Katz*, 389 U.S. at 360, 88 S.Ct. at 516 (Harlan, J. concurring)). The state argues

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privacy where defendant had been given permission to enter house by occupant's boyfriend, but occupant never had seen the defendant before and was shocked to find him in her apartment); *State v. Wise*, 879 S.W.2d 494 (Mo. 1994) (finding no legitimate expectation of privacy where defendant merely had entered occupant's apartment to make a phone call); *State v. Baltimore*, 242 Neb. 562, 495 N.W.2d 921 (1993) (finding no standing where defendant had entered neighbor's house only to use the bathroom).

Thielen's observations did not rise to the level of a search because he was not inside the leaseholder's "curtilage" when he made his observation. As support for its argument, the state offers *State v. Krech*, 403 N.W.2d 634 (Minn.1987) for the proposition that the common grounds of multi-unit apartment complexes are not entitled to Fourth Amendment protection. In *Krech*, we stated:

> "it is a fair generalization that the lands adjoining a multiple-occupancy residence are less likely to receive Fourth Amendment protection than the yard of a single family residence" because "the privacy expectation as to such an area is often diminished because it is not subject to the exclusive control of one tenant and is utilized by tenants generally and the numerous visitors attracted to a multiple occupancy building."

403 N.W.2d at 637 (quoting 1 Wayne R. LaFave, *Search and Seizure* § 2.3(f), at 414 (2d ed.1987)). The state's argument misses the point of *Krech*, however.

[13] In developing the concept of "curtilage," the Supreme Court actually extended Fourth Amendment protection to those areas so intimately tied to the home itself that an individual reasonably could have expected persons to treat those areas as part of the home. *United States v. Dunn*, 480 U.S. 294, 300, 107 S.Ct. 1134, 1139, 94 L.Ed.2d 326 (1987). The curtilage cases, therefore, necessarily involve factual scenarios in which police search areas spatially removed from the home itself. *See, e.g., Dunn*, 480 U.S. at 297, 107 S.Ct. at 1137 (agents entered area surrounding barns, 50 feet from house); *Krech*, 403 N.W.2d at 637-38 (police entered yard of duplex where garbage cans were kept). The key question in a curtilage case is not where the police officer was standing when he made his observation, although police officers must establish that they had a legal right to be where

they were at the time of the observation, rather it is the area that was observed. Although it is plausible that Thielen's presence just outside the apartment window was legitimate,[10] the state cannot rely on Thielen's position alone to justify his subsequent observation into the apartment. The fact that a police officer was situated outside a residence's curtilage does not necessarily eliminate the occupant's expectation of privacy within the interior of the dwelling. 1 LaFave, *supra*, § 2.3(d), at 495-96.

> The fundamental question under *Katz is* whether the looking intruded upon the justified expectation of privacy of the occupant. This, in turn, ordinarily requires consideration of two factors: (1) the location of the officer at the time of the viewing; and (2) the precise manner in which the view was achieved.

Id at 497.

[14] This, of course, does not mean that all instances in which a police officer looks into a house or apartment will be a search under the Fourth Amendment. "What a person knowingly exposes to the public, even in his own home or office, is not subject to Fourth Amendment protection." *Katz*, 389 U.S. at 351, 88 S.Ct. at 511. We, therefore, have held that police did not violate a homeowner's expectation of privacy by walking onto the homeowner's driveway and observing stolen property that was in plain sight from the driveway. *State v. Crea*, 305 Minn. 342, 346, 233 N.W.2d 736, 739 (1975). Other courts similarly have found no Fourth Amendment protection for activities that are easily observable by the general public.[11]

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[10] It is at least arguable that Thielen's position just outside the apartment window was on a common area and not the curtilage to Thompson's apartment.

[11] *See United States v. Acevedo*, 627 F.2d 68 (7th Cir.1980) (finding no search where police officer looked into an apartment window from a public gangway); *People v. Berutko*, 71 Cal.2d 84, 77 Cal.Rptr. 217, 453

[15,16] People who close their doors and window blinds, however, do not knowingly expose their activities to the public. Consequently, we conclude that Carter, Johns, and Thompson took sufficient precautions to keep their activities private. It was only after Thielen left the sidewalk, walked across the grass, climbed over some bushes, crouched down and placed his face 12 to 18 inches from the window that their activities became observable. As one noted commentator has stated:

> [W]hen police surveillance takes place at a position which cannot be called a "public vantage point," i.e., when the police–though not trespassing on the defendant's curtilage–resort to the extraordinary step of positioning themselves where neither neighbors nor the general public would be expected to be, the observation or overhearing of what is occurring within a dwelling constitutes a Fourth Amendment search. This is really what *Katz* is all about.

1 LaFave, *supra*, § 2.3(d), at 482. Several courts have agreed that it is a search whenever police take extraordinary measures to enable themselves to view the inside of a private structure.[12] The question before us, therefore, is whether

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P.2d 721 (1969) (finding no search where officers on defendant's front porch were able to see illegal activity through an opening in window covering); *People v. Wright*, 41 Ill.2d 170, 242 N.E.2d 180 (1968) (finding no search where officer standing on transit authority right-of-way was able to see through a crack in the window curtain into defendant's apartment); *State v. Taylor*, 61 Ohio App.2d 209, 401 N.E.2d 459 (1978) (finding no search where officers looked into unshaded apartment window from public sidewalk).

[12] *See, e.g., Lorenzana v. Superior Court of Los Angeles County*, 9 Cal.3d 626, 108 Cal.Rptr. 585, 587, 511 P.2d 33, 35 (1973) (finding a search where police leave the driveway and peek through a two-inch gap in a drawn window shade); *Olivera v. State*, 315 So.2d 487, 491 (Fla.Dist.Ct.App.1975) (finding that police violated defendant's reasonable expectation of privacy by leaving the sidewalk and walking across grass

Thielen took extraordinary measures to enable him to view the inside of the apartment. Although it is a close question whether Thielen's location at the time of his observation was legitimate, the totality of his acts makes such a determination unnecessary. For even if we concluded that the area just outside the apartment window was a common area, the fact that Thielen left the sidewalk, walked across the grass, climbed over the bushes, placed his face within 12 to 18 inches of the window and peered through a small gap between the blinds makes it clear that he took extraordinary measures to enable himself to view the inside of a private dwelling. If we conclude that his actions constituted anything other than a search, it is difficult to imagine when we would be able to say that any activity short of an actual physical intrusion of a dwelling would violate a person's expectation of privacy. We therefore hold that Thielen's conduct constituted a search under the Fourth Amendment.[13]

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outside apartment building to look into defendant's apartment window); *State v. Harris*, 919 S.W.2d 619, 623-24 (Tenn.Crim.App.1995) (stating that, while officers are free to position themselves on a public sidewalk, once they walk around the building or attempt to gaze into a window, their activity becomes a search); *State v. Bowling*, 867 S.W.2d 338, 341-42 (Tenn.Crim.App.1993) (finding a search where an officer in a driveway got down on his hands and knees with his head almost touching the ground to look into a private garage).

[13] The state asserts that Thielen's actions were analogous to those we found to be constitutional in *State v. Buchwald*, 293 Minn. 74, 196 N.W.2d 445 (1972). In *Buchwald*, an officer investigating a report of a marijuana party taking place in several hotel rooms knocked on the defendant's door and, after the defendant opened the door in response, the officer observed several marijuana cigarettes in plain view inside the room. *Id.* at 447. We held that the police officer's actions did not constitute a search. *Id.* at 448. We based our conclusion, however, on the fact the defendant had consented to the officer's "entry" by opening the door:

> The observation into the defendant's open room by the police officer positioned outside the room was not an invasion of

III. Reasonableness of the Search

[17-20] The Fourth Amendment protects persons from, among other things, unreasonable searches. U.S. const., amend. IV. In order for a search to be reasonable, the police must have both probable cause and a search warrant. *Id.*; *In re Welfare of G. (NMN) M.*, 560 N.W.2d 687,692 (Minn. 1997). In the case at bar, the state conceded that, prior to his observations through Thompson's window, Thielen did not have probable cause to obtain a search warrant. The facts also show that Thielen did not have a search warrant at the time of the observation. Despite these facts, the state now asserts that Thielen's search was reasonable because he had a reasonable basis for believing the occupants of Thompson's apartment were engaged in drug activity and because his search was minimally intrusive.[14] As the Supreme Court made clear in *Katz*, however, conduct that would constitute an illegal search does not become something less merely because the police had reasonable suspicion and embarked on a search of limited

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> defendant's privacy, for the defendant himself opened the door voluntarily. He was not compelled to open it and the voluntariness of his doing so was not the less merely because the unknown knocker was a police officer.

Id. at 448. In this case it cannot be said that Carter in any way consented to Thielen's observations.

[14] The state also asserts that Thielen's warrantless search was reasonable because there were exigent circumstances. As we have stated in the past, police can make warrantless arrests, entries and searches of dwellings when they can demonstrate the existence of probable cause and exigent circumstances. *State v. Lohnes*, 344 N.W.2d 605, 610-11 (Minn.1984). Because the state admits that Thielen lacked probable cause, however, any reliance on this exception is misplaced.

intrusiveness.[15] As such, we once again reject the notion that a little bit of information justifies a little bit of a search.

Reversed.

STRINGER, Justice, dissenting.

While I agree with the court's conclusion that the police officer's actions in this case constituted an illegal search under the Fourth Amendment, I believe that Carter failed to show that he had a legitimate expectation of privacy in Thompson's apartment and I therefore dissent.

"The proponent of a motion to suppress has the burden of establishing that his own Fourth Amendment rights were violated by the challenged search or seizure." *Rakas v.*

[15] The State argues, and the court of appeals agreed, that Officer Thielen's actions were reasonable under *State v. Crea*, 305 Minn. 342, 233 N.W.2d 736 (1975). In *Crea*, after seeing a stolen snowmobile trailer in plain view outside the appellant's house, the police shined a flashlight into the garage and the basement window of the house and saw two stolen snowmobiles. *Id.* at 738. Without specifically invoking one of the exceptions to the warrant requirement recognized by the Supreme Court, we held that the officers had acted reasonably because: 1) after seeing the stolen snowmobile trailer in the driveway, they had "very strong" probable cause to believe the stolen snowmobiles were in the house; 2) "their intrusion, being visual and involving a basement window only, was minimal"; and 3) the late hour would have made obtaining a warrant difficult. *Id.* at 740. To the extent that *Crea* may be read as establishing that a warrantless search can be justified based on a general finding that it was "reasonable," it runs counter to the Supreme Court's holdings that the fact that an officer reasonably expected to find evidence and used the least intrusive means possible to achieve that end is insufficient to sustain a warrantless search. *See Katz*, 389 U.S. at 356, 88 S.Ct. at 514. Unlike here, the officers in *Crea* had "very strong" probable cause to suspect the stolen snowmobiles were inside the house. Crea, 233 N.W.2d at 740. It was not our intent in *Crea* to step back from the requirement of probable cause and exigent circumstances or to, in any other way, modify our analysis of warrantless searches under the Fourth Amendment.

Illinois, 439 U.S. 128, 131 n. 1, 99 S.Ct. 421, 424 n. 1, 58 L.Ed.2d 387 (citations omitted). A challenge to a search must establish *ab initio* a legitimate expectation of privacy in the invaded place–that is, an expectation of privacy that "society is prepared to recognize as 'reasonable.'" *Id.* at 143-44, n. 12, 99 S.Ct. at 430, n. 12 (quoting *Katz v. United States*, 389 U.S. 347, 361, 88 S.Ct. 507, 516, 19 L.Ed.2d 576 (Harlan, J., concurring)).

The United States Supreme Court has acknowledged that the mere fact that a person is legitimately on the premises of another is insufficient to give that person standing to contest a search of the other person's premises. *Rakas*, 439 U.S. at 143, 99 S.Ct. at 430. Courts have found a legitimate expectation of privacy to exist where the defendant demonstrated a meaningful connection to the property or the host–for example, where the defendant was related to the host or had been given a key to the premises. *See, e.g., United States v. Haydel*, 649 F.2d 1152 (1981) (holding that defendant had legitimate expectation of privacy in his parent's home to which he had a key and unencumbered access); *Rose v. United States*, 629 A.2d 526 (D.C.App.1993) (holding that defendant had standing to challenge search of close relative's house to which he had a key and was a regular visitor). But standing has been denied where the party alleging an illegal search established no more than that they were a transient visitor to the property of another–where, for example, the defendant was present on the property only to use the telephone or bathroom,[1] was merely a party guest,[2] or otherwise failed to establish a connection to the property beyond simply being

[1] *See, e.g., United States v. McNeal*, 955 F.2d 1067 (6th Cir.1992) (holding no legitimate expectation of privacy where defendant stated that he had only stopped by the host's home to use the telephone); *State v. Wise*, 879 S.W.2d 494 (Mo. 1994) (holding no legitimate expectation of privacy where defendant had merely entered occupant's apartment to make

present at the time of the search.[3] Furthermore, at. least one court has recognized that a defendant present at the time of a narcotics search and a member of a criminal venture does not have a reasonable expectation of privacy sufficient to challenge the unannounced police entry of the apartment of another being used as a drug packaging operation. *See United States v. Lockett,* 919 F.2d 585 (9th Cir.1990).[4]

Here, Carter established nothing beyond the fact that he was present in Thompson's apartment for a period of 2 1/2 hours. He introduced no evidence that he had any prior relationship with Thompson, that he had ever been to her apartment before the night of his arrest, that he had personal effects in the apartment, that he had a key to the apartment, that he could invite or exclude others, or that he had any connection with the apartment other than his presence at the time of the search. The record is simply void as to any indicia that Carter was anything more than a brief, transient visitor. On these facts, it cannot be said that Carter met his burden of establishing a reasonable expectation of privacy in the apartment I would therefore hold that Carter did not have standing to challenge the search of the apartment and affirm the decision of the court of appeals.

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a phone call); *State v. Baltimore,* 242 Neb. 562, 495 N.W.2d 921 (1993) (holding that defendant who had only entered neighbor's house to use the bathroom did not have a legitimate expectation of privacy, despite the fact that defendant was occasionally given a key to the house for purpose of using the garden hose).

[2] *See, e.g., United States v. Maddox,* 944 F.2d 1223 (6th Cir.1991) (holding that defendant had no reasonable expectation of privacy where nothing in the record indicated that he was anything other than a transient party guest); *Lewis v. United States,* 594 A.2d 542 (D.C.App.1991) (holding that a mere party guest does not have a reasonable expectation of privacy in the host's home).

[3] *See, e.g., State v. Conklin,* 249 Neb. 727, 545 N.W.2d 101 (1996) (holding that defendant did not have standing to challenge search that occurred while he was in neighbor's apartment where he was only an occasional guest at the apartment, possessed no interest in the property and had no freedom to exclude anyone from the premises); *Hill v. United States,* 664 A.2d 347 (D.C.App.1995) (holding that, where there was no evidence that the defendants had a key to their friend's apartment, that they could admit or exclude others from the apartment, or establishing how much time they had spent in the apartment, they had failed to demonstrate a legitimate expectation of privacy); *Prophet v. United States.* 602 A.2d 1087 (D.C.App. 1992) (holding that defendant who had only been at his friend's house a few minutes before the police arrived did not have standing to challenge the entry); *People v. Rodriguez,* 69 N.Y.2d 159, 513 N.Y.S.2d 75, 505 N.E.2d 586 (1987) (holding that defendant found sleeping in the apartment of another had no standing where he was "a transient who had no indicia of legitimate or recognizable connection to the apartment where he was arrested or any relevant thing in that apartment"); *commonwealth v. Tann,* 500 Pa. 593, 459 A.2d 322 (1983) (holding no legitimate expectation of privacy in apartment where defendant was only occasional visitor to apartment, had no possessory or proprietary interest in it, and had been present for only 10-15 minutes prior to search).

[4] *Lockett* involved an allegation that the police, in entering an apartment that housed a drug packaging operation, did not comply with the federal "knock-and-announce" statute, 18 U.S.C. § 3109 (1988). However, the standard applied in determining whether the defendant had standing to challenge the entry was the same as that used to determine standing to challenge a search: whether the defendant had "a legitimate expectation of privacy in the property used by the joint venture." 919 F.2d at 588.

KEITH, Chief Justice (dissenting).

I join in the dissent of Justice Stringer.

BLATZ, Justice (dissenting).

I join in the dissent of Justice Stringer.

STATE of Minnesota, Respondent,

v.

Melvin JOHNS, Petitioner, Appellant.

No. C9-95-1765.

Supreme Court of Minnesota.

Sept. 11, 1997.

John M. Stuart, Minnesota State Public Defender by Bradford Colbert, Assistant State Public Defender, St. Paul, for Appellant.

Hubert H. Humphrey, III, Minnesota Attorney General, St. Paul, James C. Backstrom, Dakota County Attorney by Phillip D. Prokopowicz, Assistant Dakota County Attorney, Hastings, for Respondent.

Heard, considered and decided by the court en banc.

OPINION

TOMLJANOVICH, Justice.

The defendant, Melvin Johns, is a co-defendant of Wayne Thomas Carter. The facts **{missing}** legal issues are identical in both cases.

Based on our reasoning in the companion **{missing}** *of State v. Carter*, 569 N.W.2d 169, 178 **{missing}** (Minn.), the decision of the court of appeals is reversed.

STRINGER, Justice (dissenting).

For the reasons set forth in my dissent in *State v. Carter*, I respectfully dissent.

KEITH, Chief Justice (dissenting).

I join in the dissent of Justice STRINGER.

BLATZ, Justice (dissenting).

I join in the dissent of Justice STRINGER.

STATE OF MINNESOTA

IN COURT OF APPEALS

CX-95-1368

Dakota County — Davies, Judge

Dist. Ct. File K994985

State of Minnesota,

Respondent,

Hubert H. Humphrey III
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James C. Backstrom
Dakota County Attorney
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vs.

Wayne Thomas Carter,

Appellant.

John M. Stuart
State Public Defender
Scott G. Swanson
Assistant State Public Defender
2829 University Ave. S.E.
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Minneapolis, MN 55414

Filed April 9, 1996
Office of Appellate Courts

SYLLABUS

1. A business caller, in contrast to a social guest, is without sufficient "presence" to have a reasonable expectation of privacy in an apartment and, as such, lacks standing to assert a claim of unlawful search.

2. The following do not require a downward sentencing departure: no criminal history; business and personal success; and downward departure recommendation from probation officer.

Affirmed.

Considered and decided by Parker, Presiding Judge, Schumacher, Judge, and Davies, Judge.

OPINION

DAVIES, Judge

Appellant Wayne Thomas Carter, who was arrested after a visual search through an apartment window, challenges the legality of the search. He also challenges imposition of the presumptive sentence. We affirm.

FACTS

On May 15, 1994, a citizen told Police Officer Jim Thielen (officer) that there was drug activity in a nearby apartment. This informant told the officer that, while walking past a garden-level apartment window, he saw people packaging a white powder in plastic bags. The informant also told the officer that there was a blue four-door Cadillac with Illinois license plates nearby that possibly belonged to the people in the apartment.

After talking to the informant, the officer proceeded to the apartment building and, while standing on the front lawn, approximately 12-18 inches from a garden-level window, looked through a gap in the window blinds. He saw three people--two males and a female--working at a kitchen table. The males were putting small amounts of white powder into plastic bags, which the female then cut off for sealing. The officer observed the three people for 15 minutes, during which time they filled five or six bags.

The officer then contacted a South Metro Drug Task Force officer, who applied for a search warrant for both the car and the apartment. The suspects' car left the premises and the police arrested its occupants before the search warrant was obtained. The officer recognized appellant Wayne Carter, the car's driver, and Melvin Johns, the car's passenger, as the two males he had seen in the apartment.

Police seized an automatic pistol (which was in plain view) from the passenger-side floor. When they later received and executed the search warrant for the car, the police recovered a black leather bag containing 47.1 grams of cocaine packaged in plastic bags, along with pagers and a scale.

Carter was found guilty, on stipulated facts, of conspiracy to commit a controlled substance crime in the first degree in violation of Minn. Stat. §§ 152.021, subd. 1(1), and 609.05 (1992) (count I), and controlled substance crime in the first degree (aiding and abetting) under Minn. Stat. §§ 152.021, subd. 2(1), and 609.05 (1992) (count II).

Carter was sentenced (only on count I) to the presumptive guidelines sentence of 86 months in prison. He now appeals, challenging the legality of the search and the failure to depart downward from the presumptive sentence.

ISSUES

I. Does Carter have standing to object to the officer's visual search?

II. Did the court err in failing to depart downward from the presumptive sentence?

ANALYSIS

I. Standing

As a threshold matter, the trial court ruled that Carter, as a short-duration caller, had no standing to object to the officer's peering into the apartment window. Carter disagrees and argues that his status, which he claims was as an "invited houseguest," is one to which society is willing to give an "expectation of privacy" and Fourth Amendment protection. On these stipulated facts, this presents a question of law, which we review de novo. ***Frost-Benco Elec. Ass'n v. Minnesota Pub. Utils. Comm'n,*** 358 N.W.2d 639, 642 (Minn. 1984).

> [C]apacity to claim the protection of the Fourth Amendment depends * * * upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place.

Rakas v. Illinois, 439 U.S. 128, 143, 99 S. Ct. 421, 430 (1978) (citing ***Katz v. United States,*** 389 U.S. 347, 353, 88 S. Ct. 507, 512 (1967)). A subjective expectation of privacy is legitimate if it is "one that society is prepared to recognize as

'reasonable.'" ***Katz,*** 389 U.S. at 361, 88 S. Ct. at 516 (Harlan, J., concurring).

As support for their respective conclusions, Carter and the state (as did the trial court) cite ***Minnesota v. Olson,*** 495 U.S. 91, 110 S. Ct. 1684 (1990). In ***Olson,*** the police made a warrantless, nonconsensual entry into a house and arrested Olson. ***Id.*** at 93-94, 110 S. Ct. at 1686-87. The United States Supreme Court, in affirming the Minnesota Supreme Court, held that ***Olson,*** as an overnight houseguest, had a reasonable expectation of privacy in the house protected by the Fourth Amendment. ***Id.*** at 96-97, 110 S. Ct. at 1688. Carter argues that the ***Olson*** holding applies to him.

The trial court stated that Carter presented no evidence--other than that he was an out-of-state resident--to show that his status created a reasonable expectation of privacy. We agree with the trial court's assessment.

Olson suggests that staying overnight in another's home is indicative of a sufficient "presence." Carter presents no evidence he was an overnight guest, and the suggestion that Carter may raise Fourth Amendment objections to a search of the premises solely because he was legitimately on the premises has been rejected as "too broad a gauge for measurement of Fourth Amendment rights." ***Rakas,*** 439 U.S. at 142, 99 S. Ct. at 429. The "legitimate expectation of privacy" standard requires a stronger presence than mere legitimate presence.

Overline v. State, Comm'r of Pub. Safety, 406 N.W.2d 23 (Minn. App. 1987), shows that an overnight stay is not necessarily required for standing. In ***Overline,*** an intoxicated man ran his truck off the highway into some trees, injuring his hand. ***Id.*** at 25. The man telephoned friends for a ride, they presumably complied, and shortly thereafter police entered the friends' home without a warrant and found the man. ***Id.*** This court held that the intoxicated man had a "legitimate expectation of privacy" in the home and therefore was entitled

to raise a claim that the police violated his Fourth Amendment rights by entering the home without a warrant. ***Id.*** at 27. No Fourth Amendment violation was found, however. ***Id.*** at 28.

Carter's presence here falls short of that in ***Overline,*** just as it falls short of ***Olson.*** Contrary to ***Overline,*** Carter's claim that he was predominantly a social guest in the apartment is inconsistent with the only evidence concerning his stay in the apartment, which indicates that he used it for a business purpose--to package drugs. This defeats the "legitimate expectation of privacy" standard, which requires "more than a subjective expectation of nct being discovered." ***Rakas,*** 439 U.S. at 143 n.12, 99 S. Ct. 430 n.12. Carter's "presence" at the apartment was thus insufficient to give him standing. We affirm the trial court's conclusion that Carter lacks standing to object to the officer's observation of activities inside the apartment.

Having concluded that Carter lacks standing to object to the search, we do not reach his claim that the police search violated his Fourth Amendment right to be free from unreasonable searches.

II. Sentence

Carter claims that the court abused its discretion in sentencing him to the 86-month presumptive term. The supreme court has stated the applicable standard of review for a refusal to depart:

> [W]e do not intend entirely to close the door on appeals from refusals to depart [from the presumptive sentence]. However, we believe that it would be a rare case which would warrant reversal of

> the refusal to depart. * * * [T]he Guidelines state that when substantial and compelling circumstances are present, the judge "may" depart. This means that the ***trial court has broad discretion*** and that we generally will not interfere with the exercise of that discretion.

State v. Kindem, 313 N.W.2d 6, 7 (Minn. 1981) (emphasis added) (citation omitted). A sentencing judge may depart from the sentencing guidelines if "substantial grounds exist which tend to excuse or mitigate the offender's culpability, although not amounting to a defense." Minn. Sent. Guidelines II.D.2.a.(5).

Carter contends that three factors constitute "substantial grounds" tending to excuse or mitigate his culpability: (1) he has no criminal history; (2) he has succeeded at a number of endeavors (business and personal); and (3) the probation officer recommended a short prison term because he believed that Carter does not appear to be a risk to the community. We disagree that these grounds require departure.

Carter's lack of a prior criminal history is not a mitigating factor, but rather is considered in the sentencing guidelines grid. ***Cf. State v. Brusven***, 327 N.W.2d 591, 593 (Minn. 1982) (because criminal history is considered in determining presumptive sentence, "it generally would be unfair to consider [it] again" as support for departure). Nor are social factors, such as employment history or educational attainment, qualifying factors. Minn. Sent. Guidelines II.D.1.c., d. Finally, a downward departure recommendation in a pre-sentence investigation report is not a delineated factor justifying a departure, and even if it were, the existence of a mitigating factor does "not obligate the court" to grant a downward departure. **State *v. Wall,*** 343 N.W.2d 22, 25 (Minn. 1984).

We recognize "the growing body of evidence relating to '[t]he disparity of sentencing between people of color and whites.'" ***State v. Williams,*** 525 N.W.2d 538, 549 (Minn. 1994). However, the sentencing court's reasons for declining to depart dispositionally--including Carter's failure to acknowledge the extent of his involvement in cocaine distribution and the amount of drugs confiscated--supports the court's refusal to depart. The court acted within its discretion.

DECISION

As a short-term business caller, appellant lacks standing to object to a search of the apartment. The court did not abuse its discretion in sentencing appellant to the presumptive term.

Affirmed.

/S/
Judge Jack Davies

April 2, 1996

This opinion will be unpublished and may not be cited except as provided by Minn. Stat. § 480A.08, subd. 3 (1994).

STATE OF MINNESOTA
IN COURT OF APPEALS
C9-95-1765

State of Minnesota,
Respondent,

vs.

Melvin Johns,
Appellant.

Filed June 11, 1996
Affirmed
Kalitowski, Judge

Dakota County District Court
File No. K394982

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Bradford Colbert, Assistant State Public Defender, William Mitchell College of Law, 875 Summit Avenue, LEC 304, St. Paul, MN 55015 (for Appellant)

Considered and decided by Randall, Presiding Judge, Kalitowski, Judge, and Schultz, Judge.*

UNPUBLISHED OPINION

KALITOWSKI, Judge

Appellant Melvin Johns challenges his convictions for first-degree controlled substance and conspiracy offenses based on: (1) the legality of the police officer's search; and (2) the district court's refusal to allow his public defender to argue lenity to the jury. We affirm.

DECISION

I.

On review, this court accepts a trial court's findings of fact on Fourth Amendment issues, unless clearly erroneous, and independently applies Fourth Amendment case law to the facts so found. ***State v. Saffeels,*** 484 N.W.2d 429, 430 (Minn. App. 1992) (citing ***State v. Storvick***, 428 N.W.2d 55, 58 n.1 (Minn. 1988)), ***review denied*** (Minn. June 1, 1992).

1. Standing

The Constitutions of both the United States and Minnesota protect citizens from unreasonable search and seizure. U.S. Const. amend. IV; Minn. Const. art. I, § 10. The initial inquiry in every search and seizure case is whether the defendant has standing to object to the search or seizure.

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* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

State v. Sorenson, 441 N.W.2d 455, 457 (Minn. 1989). Standing exists when the person challenging the search has a reasonable expectation of privacy in the area searched. ***Rakas v. Illinois,*** 439 U.S. 128, 143, 99 S. Ct. 421, 430 (1978); ***id.***

This court recently held Johns's co-conspirator lacked standing to challenge the officer's search because the motive for his presence in the apartment at issue was illegal business rather than social interaction. ***State v. Carter,*** 545 N.W.2d 695, 698 (Minn. App. 1996). Here, because we conclude Johns's Fourth Amendment claims fail on the merits, we do not determine whether Johns had standing to challenge the officer's search.

2. Fourth Amendment challenges

Assuming standing exists, Johns raises Fourth Amendment challenges based on invasion of the curtilage and the officer's visual search of the apartment.

The Fourth Amendment protects the home and its curtilage from unreasonable searches and seizures. ***Oliver v. United States,*** 466 U.S. 170, 180, 104 S. Ct. 1735, 1742 (1984). Police may, without a warrant, enter the areas of the curtilage impliedly open to use by the public. ***State v. Crea,*** 305 Minn. 342, 346, 233 N.W.2d 736, 739 (1975). In doing so, they are free to keep their eyes open and use their other senses. ***Id.*** Once police step off the area open to public use without a warrant, the test becomes whether the police acted reasonably. ***Id.*** at 346, 233 N.W.2d at 740. In determining the reasonableness of the officers' search, the reviewing court considers: (1) the intrusiveness of the search; (2) whether the officers had probable cause to believe evidence of criminal activity would be found; and (3) whether the officers would have difficulty obtaining a search warrant at that hour. ***Id.*** at 346-47, 233 N.W.2d at 740.

Here, a confidential informant told the officer he had just seen through a window of the apartment at issue three persons packaging drugs. To corroborate the informant's story, the officer walked to the apartment complex, stood 12 to 18 inches from the window and observed the three persons inside packaging drugs at the kitchen table for approximately 15 minutes.

We conclude the officer acted reasonably by walking up to the window and making the initial glance inside and by continuing to look in the window in an attempt to corroborate the informant's story. First, the supreme court has stated that the

> lands adjoining a multiple-occupancy residence are less likely to receive Fourth Amendment protection than the yard of a single-family residence because the privacy expectation as to such an area is often diminished because it is not subject to the exclusive control of one tenant and is utilized by tenants generally and the numerous visitors attracted to a multiple-occupancy building.

State v. Krech, 403 N.W.2d 634, 637 (Minn. 1987) (quoting 1 W. LaFave, Search and Seizure § 2.3(f) at 414 (1987)). Second, the officer's search was visual, never disturbing the persons inside the apartment and not requiring the officer to remove obstacles to see through the window. Third, because of the informant's detailed firsthand description of the drug activity, the search is entitled to greater weight under the totality of the circumstances test for determining probable cause. ***See Illinois v. Gates,*** 462 U.S. 213, 234, 103 S. Ct. 2317, 2330 (1983). Fourth, the officer sought search warrants immediately and procured such warrants in the middle of the night before physically searching the apartment. Accordingly, we conclude the visual search was part of a logical in-the-

field investigative technique, to which this court accords deference. ***See State v. Alayon,*** 459 N.W.2d 325, 330 (Minn. 1990). Because no Fourth Amendment violation occurred, the district court properly admitted the evidence against Johns.

II.

The supreme court has determined the jury in a criminal case has the power of lenity, that is, the power to acquit despite the law and the facts. ***State v. Perkins,*** 353 N.W.2d 557, 561 (Minn. 1984). A defendant does not, however, have the right to an instruction informing the jury of its power of lenity. ***Id.*** at 562. We conclude the district court did not err in refusing to allow defendant's counsel to argue lenity to the jury in opening argument when the court had already determined the legality of the officer's actions through the omnibus hearing. ***See id.*** (referring approvingly to ***United States v. Brown,*** 548 F.2d 204, 210 (7th Cir. 1977), which held the trial court may bar a defense attorney from arguing lenity to the jury).

Affirmed.

S/Thomas Kalitowski
6-5-96

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF DAKOTA FIRST JUDICIAL DISTRICT

State of Minnesota,

Plaintiff, ORDER PURSUANT TO OMNIBUS HEARING

vs.

Wayne Thomas Carter,

Defendant.

File No. K9-94-0985

This matter came on for omnibus hearing before the undersigned Judge of District Court on the 21st day of September, 1994, at the Dakota County Judicial Center, Hastings, Minnesota.

Phillip Prokopowicz, Assistant Dakota County Attorney, appeared on behalf of the State of Minnesota; Bruce Cowan, Esq. and David Holman, Esq., appeared on behalf of Defendant..

Based upon the files, records, and proceedings herein, the Court makes the following:

FINDINGS OF FACT

1. On May 15, 1994, Officer Thielen of the Eagan Police Department received information from an individual described as a "confidential informant" that suspected drug

activity was being conducted at 3943 South Valley View Drive, apartment 103 in Eagan, Minnesota.

2. The confidential informant informed Officer Thielen that he/she observed the drug activity as he/she walked by the apartment window.

3. The individual indicated that he/she observed people sitting in the apartment around a table which had white powder on it.

4. The individual further advised Officer Thielen that the people inside the apartment were "bagging" the white powder.

5. The individual also stated that he/she believed a vehicle, described as a blue four door Cadillac with Illinois plate number SGD-896, was being used by the occupants of apartment number 103.

6. In response to this information, Officer Thielen went to the apartment complex and approached the apartment window. The time was approximately 8:00 p.m.

7. To approach the apartment in question, Officer Thielen left the common sidewalk used to enter the apartment building and walked on a grassy common area to the window of the apartment.

8. Officer Thielen stood approximately 12 to 18 inches from the apartment window. The horizontal mini-blinds were drawn; however, gaps existed in the blinds through which Officer Thielen could see activity in the apartment.

9. While looking through the gaps in the blinds, Officer Thielen observed three individuals, two male and one female, sitting at a kitchen table.

10. One of the males appeared to be placing a white powdery substance onto the kitchen table. He then passed the white substance to the second male, who placed the powder into a plastic bag. The second male gave plastic bag to the female who cut off the ends of the bag and placed it on the table.

11. The officer observed this activity for approximately 15 minutes. He then left the apartment complex to phone Officer Kallestad of the South Metro Drug Task Force. After Officer Thielen's initial 15 minute observation, the apartment, its occupants and the apartment complex went unobserved by any officer for one and one-half hours.

12. Officer Thielen spoke to Officer Kallestad and reported his findings.

13. Based upon the conversation with Officer Thielen, Officer Kallestad proceeded to have search warrants prepared for the suspected apartment and a vehicle identified as a 1985 blue four door Cadillac, Illinois license plate number SGD-896.

14. At approximately 10:30 p.m. an Eagan police officer observed two male individuals putting items into the Cadillac identified by Officer Thielen's confidential informant.

15. When the vehicle attempted to leave the parking lot it was stopped by the Eagan Police Department.

16. The vehicle was detained and Defendant was identified as the driver and owner of the vehicle. Police told Defendant and his passenger to get out of the car. As the police opened the door to allow the passenger to get out of the car, the police saw a black zippered pouch and a handgun on the floor of the vehicle near the right front seat. The Defendant and the passenger were then placed under arrest.

17. The vehicle was then towed to the Eagan Police Department and impounded, but not searched at that time.

18. At approximately 1:30 a.m. on May 16, 1994, the officers executed a search warrant on the vehicle, and discovered approximately 40 grams of a white mixture, pagers, and a scale. The white mixture later tested positive for cocaine.

19. Both the State and Defendant stipulated that the only lessee of apartment number 103 was Kimberly Thompson.

20. Defendant is a resident of Chicago, Illinois.

21. No evidence was presented as to Defendant's status in the apartment other than he was viewed by Officer Thielen as being in the apartment for a period of a few hours on May 15, 1994.

22. The affiant who provided the application for the issuance of a search warrant and an affidavit in support thereof did not include material misstatements of fact as to invalidate the search warrant.

23. The affiant who provided the application for the issuance of a search warrant and an affidavit in support thereof did not deliberately or recklessly misrepresent any statements of fact as to invalidate the search warrant.

24. Subsequent to his arrest, Defendant was charged with two separate counts of controlled substance crime in the first degree.

CONCLUSIONS OF LAW

1. Defendant does not have standing to challenge whether Officer Thielen's initial observations into Kimberly Thompson's apartment on May 15, 1994 violated his rights under the United Stated Constitution or the Minnesota State Constitution.

2. Even if Defendant were found to have standing, the State of Minnesota has alleged sufficient facts to support a finding that observations made by Officer Thielen do not constitute an illegal search, in violation of the Fourth Amendment to the United States Constitution or Article I, Section 10 of the Minnesota Constitution.

3. As the registered owner of the vehicle in question, Defendant does have standing to challenge the validity of the stop and subsequent search of the vehicle.

4. Officer Thielen and the Eagan Police had an articulable and reasonable basis to stop Defendant's vehicle on May 15, 1994.

5. Officer Thielen and the Eagan Police had probable cause to seize the vehicle on May 15, 1994 when they observed a handgun and black zippered pouch.

6. The State of Minnesota has alleged sufficient facts to support a finding of probable cause to execute a search warrant for Defendant Carter's vehicle based upon Officer Thielen's initial observations through the apartment window. The search warrant executed by the police for Defendant's vehicle was valid as the affidavits the warrant relied upon established probable cause for the search and did not include false, material information that was recklessly submitted by the applicant for the search warrant.

ORDER

1. Defendant's motion to suppress all evidence obtained as a result of Officer Thielen's initial observations of apartment number 103 located at 3943 South Valley View Drive in Eagan, Minnesota on May 15, 1994 is hereby DENIED.

2. Defendant's motion to suppress all evidence obtained as a result of the search of Defendant's vehicle, a 1985 Cadillac, Illinois license plate number SGD-896, on May 16, 1994, Defendant's vehicle is hereby DENIED.

3. A "not guilty" plea is entered on behalf of Defendant Carter.

4. The above-entitled matter is hereby set on for jury trial at 9:00 a.m. on Tuesday, January 17, 1995 at the Dakota County Judicial Center, Hastings, Minnesota.

5. The attached memorandum is incorporated in and made part of this Court's FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER.

Dated this 16th day of December, 1994.

BY THE COURT:

/S/
Robert F. Carolan
Judge of District Court

MEMORANDUM

Defendant challenges the search and seizure of the physical evidence involved in the instant case. His argument is three-fold: (1) The observation of Officer Thielen from the grounds adjacent to Kimberly Thompson's garden level apartment was an illegal search of said premises; (2) the subsequent stop of Defendant's vehicle was not valid; and (3) the affidavits relied upon for the execution of the search warrant for Defendant's vehicle was based on statements that were "recklessly false" and lacked sufficient probable cause.

I. STANDING

The Defendant was observed by Officer Thielen as an occupant of the apartment while he made his observations through the apartment window. No evidence was presented at the hearing that Defendant had lived at this apartment long term, was an overnight guest or was related to the leaseholder. The only evidence presented showed that Defendant was a resident of Chicago, Illinois and had been at the apartment for a period of a few hours on May 15, 1994, during the police observation.

"The Fourth Amendment depends not upon a property right in the invaded place but upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place." Rakas v. Illinois, 439 U.S. 128, 143, 99 S. Ct. 421, 430, 58 L.Ed.2d 387 (1978) (citations omitted). An expectation of privacy is "legitimate" if it is one that society is prepared to recognize as reasonable. Id. at 143-44, n.12 (citation omitted). Legitimacy, however, means more than a subjective expectation of not being discovered. Id.

In Minnesota v. Olson, 495 U.S. 91, 110 S. Ct. 1684, 109 L.Ed.2d 85 (1990), police suspected Olson of being the driver

of a car used in a robbery-murder. The day after the robbery-murder, police received a call from a woman living in a duplex that a man who claimed he was the driver of a vehicle used in a robbery was staying in the unit upstairs. The unit in which Olson was staying was leased to the caller's daughter. The police stayed away from the duplex until they were notified Olson was at the duplex. When officers approached the duplex unit and told Olson to come out, they heard a male voice say, "tell them I left." The officers then entered the unit, without consent, and arrested Olson.

The United States Supreme Court held that Olson, as an overnight guest, demonstrated that he had a sufficient enough connection with the duplex unit to be treated like a homeowner and that the arrest, therefore, was illegal. Olson, 495 U.S. at 100. The Court further held that as an overnight guest, Olson had a reasonable expectation of privacy and had standing to challenge his arrest since society recognizes this expectation as reasonable. Id. at 97. "Staying overnight in another's home is a longstanding social custom that serves functions recognized as valuable by society." Id. at 98.

No evidence was presented by Defendant that his status in Ms. Thompson's apartment was similar to Olson or that his status was one that was envisioned to be protected under the Olson rationale. The only evidence presented showed Defendant as an out of state resident who had been at the apartment for a period of time on May 15, 1994. Without more evidence the Court cannot conclude that Defendant's expectation of privacy in the apartment was based upon "understandings that are recognized and permitted by society," and therefore legitimate. As such, the Court determines that based upon the evidence presented Defendant does not have standing to challenge the search made by Officer Thielen into Kimberly Thompson's apartment.

II. OFFICER THIELEN'S INITIAL OBSERVATIONS THROUGH KIMBERLY THOMPSON'S WINDOW

Officer Thielen did not violate Defendant's constitutional right against unreasonable searches and seizures because the officer's observations were made from an area in which Defendant had no "reasonable expectation of privacy." The observations made by the officer were made from a common area opened to the public and other occupants of the apartment complex were limited to articles in plain sight.

Once Officer Thielen spoke to the anonymous individual who identified the apartment in question, he approached the apartment which was at garden level. A garden level apartment is one that a part of the apartment is below ground and if one looked though a window at full height that person would have to look downward to see the furniture of the apartment. While standing on the grounds outside the window of the apartment, the officer peered through the mini-blinds. The officer testified that there were gaps in the blinds which allowed him to view activity in the apartment. While looking downward and through the window, the officer observed Defendant and two other individuals bagging white powder. After observing this conduct for a period of time, he called his supervisor who proceeded to execute search warrants of the apartment and a vehicle identified by the anonymous individual as belonging to one of the apartment's occupants.

Unlike a single family dwelling, an apartment complex shares its sidewalks, grounds and corridors amongst all its residents. While the federal and state constitutions protect against unreasonable searches of one's home and surrounding curtilage, the Court must determine whether the ground the officer stood upon while observing the apartment is the kind envisioned to be within the curtilage of the apartment and therefore protected from unreasonable searches.

A four factor test has been used in Minnesota to determine whether an area claimed as curtilage and the extension of an individual's expectation of privacy to that area is protected. The four factors are: (1) the proximity of the area claimed to be curtilage to the home; (2) whether the area is included within an enclosure surrounding the home; (3) the nature of uses to which the area is put; and, (4) the steps taken by the residents to protect the area from observation by people passing by. State v. Krech, 403 N.W.2d 634, 636-37 (Minn. 1987).

When applying the factors to the instant case it becomes apparent that Defendant did not have an expectation of privacy from the location where Officer Thielen made his observations outside Ms. Thompson's window. First, while the proximity of the area to Ms. Thompson's window is quite close, the nature of the grounds as being common to all residents detracts from the closeness of the claimed curtilage area to Ms. Thompson's apartment. Ms. Thompson did not own the land immediately outside her window and could not claim any particular exclusive rights to said land. Second, the area is not within an enclosure surrounding the home. There is no fence blocking entrance to this spot from the public. There are no bushes or trees planted immediately in front of the window to create an enclosure type space that prevents the public from gaining entrance to the area. Third, the nature to which this area is put favors the position that this ground is not curtilage to her apartment. This area is a common area open to all residents of the apartment complex. Though the area is not a ball field, exhibits 8, 9, 15, 16 and 17 show that the public had access to the area directly in front of Ms. Thompson's windows to store bicycles. Residents obviously must leave the common sidewalk leading up to the building to deposit their bicycles and other items. Fourth, while Ms. Thompson did make an attempt to protect her apartment from

observation by drawing the blinds, no attempt was made to protect the area claimed as curtilage from passerby.

In support of his argument that the ground stood upon is protected as curtilage due to the fact that it was private ground in which no invitation was extended to the officer, Defendant relies upon Lorenza, et al. v. Superior Court, 9 Cal. 3d. 626, 511 P.2d 33, 108 Cal. Rptr. 585 (1973). In that case an officer approached a single family home and left the sidewalk approaching the home to look through a window that was not accessible through normal routes. The appellate court held that such an observation was unreasonable and violated the defendant's constitutional rights.

The Lorenza case is, however, distinguishable from the instant case. The instant case does not involve a single family home on private land. The apartment in this case was surrounded by property used by the entire apartment complex. Exhibits 8, 9, 15, 16 and 17 show a bicycle leaned up next to the apartment window of the apartment in question. Someone had to have left the sidewalk to put the bicycle there. There was also testimony that the complex housed families and it was common to see children and others leave the sidewalk areas and walk freely on the grassy areas of the complex. There does not appear to be any posted signs informing apartment residents or there guests to stay off the grass. And although bushes are planted at an angle off the sidewalk in front of one of the apartment's windows, there was no evidence presented that the bushes were planted for privacy reasons and not for aesthetic reasons.

Though Minnesota has no rule which deals with the specific facts of the instant case, the supreme court in State v. Buchwald, 196 N.W.2d 445 (Minn. 1972), acknowledged the reduced expectation of privacy over areas adjacent to motel rooms. "Granted that a [motel] tenant has standing to protect the room he occupies, there is nevertheless an element of public or shared property in motel surroundings that is

entirely lacking in the enjoyment of one's home." Id. at 448. Once it is determined that the area adjacent to an apartment window is not private but is common grounds for the entire complex, Buchwald would suggest that such an area would lose any constitutional protection. As the exhibits show, residents did walk upon and use the grassy area in front of Ms. Thompson's window. This evidence demonstrates that the area was common ground for the complex and therefore is not within the curtilage of the apartment Defendant occupied. As such, Defendant had no expectation of privacy in this area and the officer's observations did not constitute a search.

III. STOP OF DEFENDANT'S VEHICLE

After observing the incident inside the apartment, Officer Thielen called Officer Kallestad of the South Metro Drug Task Force for instructions. Officer Kallestad advised Officer Thielen to observe the individuals in the apartment and to stop the individuals if they attempted to leave the area. After a period of time, Officer Thielen and other Eagan police officers observed the Defendant and another male leaving the apartment with a black zippered bag. These two individuals got into the vehicle which was described earlier by the confidential informant and drove away. Eagan police subsequently stopped the vehicle, later identified as owned by Defendant, and told the two individuals to get out of the vehicle. Upon opening the passenger side door to allow the passenger to exit the vehicle, the police saw in plain view the black zippered bag and a handgun. Defendant and the other male were then placed under arrest. Defendant contends the stop of the vehicle was in violation of his constitutional rights.

In interpreting the state constitution the Minnesota Supreme Court in Matter of Welfare of E.D.J., 502 N.W.2d 779 (1993), held that when determining whether an investigatory "seizure" of the defendant occurred by the police

the test is if the court can determine objectively, on the basis of the totality of the circumstances whether a reasonable person having the defendant's perspective would have concluded he was not free to leave. E.D.J., 502 N.W.2d at 780. If a seizure is determined to have occurred by the court then the question becomes whether the police articulated a sufficient basis for suspecting the particular person stopped of criminal activity. Id. at 783. "The suspicion that the officer must be able to articulate must be more than an unarticulated 'hunch,' the officer must be able to point to something that objectively supports his position." State v. Johnson, 444 N.W.2d 824, 825-26 (Minn. 1989).

In the instant case, the actions by the police created the seizure of Defendant as they stopped the vehicle with flashing lights and approached the automobile slowly with guns drawn. Based upon the earlier observations of Officer Thielen as well as the vehicle description given to Officer Thielen by the anonymous person, the police have articulated a sufficient basis for the stop. Officer Thielen observed two individuals leaving the apartment building and identified them as the same two males in the apartment bagging white powder. The officer knew the vehicle had Illinois plates and could leave the area permanently. He testified that his training had also told him that automobiles are highly common in the transportation of narcotics. He could have reasonably concluded that these two individuals knew something about the activity involving the white powder in the apartment complex and possibly were in possession of some or all of this powder while in the vehicle. He could reasonably suspect that the white powder was contraband in view of how it was being handled in Ms. Thompson's apartment. He therefore formed an articulable basis to believe these two men were involved in criminal activity.

IV. STATEMENTS IN THE SUPPORTING AFFIDAVITS

Defendant contends that police officers recklessly included false statements in the supporting affidavits relied upon by the Hon. George Hoey who issued the search warrants in the instant case. Therefore he argues the evidence seized pursuant to the warrants should be excluded from evidence. The burden of proof in establishing the existence of false statements or misrepresentations is on the Defendant to override the "presumption of validity with respect to affidavit(s) supporting search warrant(s)" and demonstrate that the statement is false. Franks v. Delaware, 438 U.S. 154, 171, 98 S. Ct. 2674, 2684, 57 L.Ed.2d 667, -- (1978). The determination has already been made that Defendant lacks standing to challenge of Officer Thielen's initial observations into Kimberly Thompson's apartment. Defendant, therefore, lacks the standing to challenge the issuance of the search warrant for Kimberly Thompson's apartment. He does have standing to challenge the search warrant that was issued for his vehicle.

In State v. Causey, 257 N.W.2d 288, 291 (Minn. 1977), the supreme court adopted a two-prong test to determine whether the particular statements used in an affidavit are of such a nature as to invalidate a search warrant: (1) whether the misstatement of fact in the affidavit is material to the determination of probable cause; and, (2) if the misstatement is material, it must be determined whether the police officer or other agent deliberately or recklessly misrepresented the fact. Causey, 257 N.W.2d at 292-93. Innocent misrepresentation, even though material to the determination of probable cause, is insufficient to invalidate a warrant. Id. at 291.

In the instant case, Defendant asserts that Officer Kallestad in his affidavit in support of the application for the issuance of search warrants misled the judge by implying that

an ongoing investigation occurred regarding drug activity in the apartment complex. Specifically, the affidavit states that "during May of 1994," Officer Thielen was contacted by a confidential informant regarding drug activities at the complex. See Exhibit 1. The burden is on Defendant to show this statement is deliberately false. No additional evidence was presented by Defendant other than the statement contradicts with the later statement in the affidavit describing Officer Thielen's observations occurring on May 15, 1994, thereby implying that an investigation was ongoing. Additionally, though the statement can be construed as misleading, the statement cannot be said to form the basis of probable cause for these search warrants. The material determination of probable cause is based upon Officer Thielen's observations of the apartment and not the statement that could appear to state that "an investigation was ongoing. " Even if the Court were to determine the statement was misleading, it is not a material misstatement to the determination of probable cause because probable cause for the issuance of a warrant was established solely by Officer Thielen's own observations into the apartment and other information he received from his confidential informant. Defendant's argument fails the two-prong Causey test.

Defendant also cites the statement in Officer Kallestad's affidavit that the apartment was kept under constant surveillance after Officer Thielen's initial observations as deliberately false and misleading. Again, Defendant fails to meet his burden under the Causey test. Defendant fails to show by additional proof that Officer Kallestad's statement was deliberately misleading. Also, the statement was not determinative of being material in forming probable cause. Although Officer Thielen left the scene for 90 minutes to call Officer Kallestad, this statement is not material to forming probable cause. Officer Thielen's observations themselves are the material portion of the affidavit.

V. AFFIDAVITS AND ISSUE OF PROBABLE CAUSE

Defendant lastly contends that the search warrants were issued without sufficient probable cause and are therefore invalid.

The Fourth Amendment of the United States Constitution as well as article I section 10 of the Minnesota Constitution prohibits searches and seizures of people and places without probable cause. For a warrant to issue, a neutral magistrate or judge must find, within the warrant application and supporting affidavits, probable cause to believe that certain property was involved in a crime or possession of the property is a crime. See Minn. Stat. § 626.07. The test for probable cause is met if the affidavits, interpreted in a reasonable manner under the totality of the circumstances, sets forth competent evidence leading a reasonable, prudent person to believe that there is a basis for the search or articles sought are located in a certain area.

When a Court reviews the sufficiency of probable cause on a search warrant affidavit, a balance must be struck between an individual's Fourth Amendment right and the need for some leeway in law enforcement for society's protection. Brinegar v. U.S., 338 U.S. 160, 176, 69 S. Ct. 1302, 1311, -- L.Ed.2d -- (1949). In Illinois v. Gates, 462 U.S. 213, 103 S. Ct. 2317, 76 L.Ed.2d 527 (1983), the Supreme Court created the standard of review in determining the sufficiency of search warrant affidavits: "The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place." Gates, 462 U.S. at 238, 103 S. Ct. at 2332. Among factors to consider by the Court are "type of crime, nature of items sought, extent of a suspects opportunity for concealment and normal inferences as to where suspects would keep items." State v. Pierce, 358

N.W.2d 672, 673 (Minn. 1984). When reviewing an issuance of a search warrant, the Court should give deference to the probable cause determination of the issuing judge and reverse only where no substantial basis for probable cause can be found. Massachusetts v. Upton, 466 U.S. 727, 104 S. Ct. 2085, 80 L.Ed.2d 721 (1984).

The supporting affidavits in the instant case is based upon sufficient facts to enable an independent judge to determine probable cause existed. This is done primarily through Officer Thielen's observations through the apartment window whereby he saw individuals bagging a white powder. Based upon his training and experience, he was able to conclude that such activity is consistent with drug packaging. Therefore, a review of the entire affidavit creates a "fair probability" that contraband or evidence of a crime will be found in a particular place.

R.F.C.

STATE OF MINNESOTA		DISTRICT COURT
COUNTY OF DAKOTA		FIRST JUDICIAL DISTRICT
State of Minnesota,	¦	
Plaintiff,	¦	File No. K9-94-985
vs.	¦	
Wayne Thomas Carter,	¦	OMNIBUS HEARING
Defendant.	¦	Volume 1 of 2
State of Minnesota,	¦	
Plaintiff,	¦	File No. K3-94-982
vs.	¦	
Melvin NMN Johns,	¦	OMNIBUS HEARING
Defendant.	¦	Volume 1 of 2

The above-entitled matters came on for hearing before the Honorable Robert F. Carolan, one of the Judges of the District Court, on the 21st day of September, 1994, at the Dakota County Judicial Center, City of Hastings, County of Dakota and State of Minnesota.

APPEARANCES:

PHILLIP D. PROKOPOWICZ, ESQ., Assistant Dakota County Attorney, Dakota County Judicial Center, 1560 West Highway 55, Hastings, Minnesota 55033, appeared on behalf of the state, and:

BRUCE COWAN, ESQ., 5865 North Lincoln Avenue, Chicago, Illinois 60659, appeared on behalf of the defendants, and:

DAVID L. HOLMAN, ESQ., International Village Office Arcade Building, 220 West 98th Street, Bloomington, Minnesota 55420, appeared on behalf of the defendants.

* * *

MR. PROKOPOWICZ: State is ready to Proceed.

Just for the record, it's the state's understanding, regarding the issues to be raised at this particular hearing, would be the search and seizure of defendant Kimberly Thompson's apartment on or about May 16th -- actually, 15th and into the 16th of 1994, as well as a stop of a motor vehicle which was being driven by defendant Johns and defendant Carter on or about May 15th, May 16th of 1994, and the probable cause surrounding those particular stops. As a result, we did give notice to defense counsel of some additional statements that were taken from some of his clients: those are not in issue.

It's basically the legitimacy of the stop, search and, naturally, if the arrest was bad then the state would agree the statements would fall by the wayside, as well as the physical evidence obtained in this particular case.

* * *

KEVIN KALLESTAD,

was called as a witness and, having been first duly sworn, was examined and testified as follows:

THE CLERK: For the record, would you state your full name, spelling your last?

THE WITNESS: My name is Kevin Kallestad. That's K-a-l-l-e-s-t-a-d.

* * *

DIRECT EXAMINATION

BY MR. PROKOPOWICZ:

Q. Mr. Kallestad, can you begin by telling the court what you do for a living?

A. I am a licensed police officer in the State of Minnesota.

Q. How long have you been a licensed police officer, approximately?

A. Approximately 15 years.

Q. And what is your current department that you work for?

A. I am currently working for the Metropolitan Transit Police.

Q. And how long have you been with that particular department, approximately?

A. Approximately two months.

Q. And prior to that who did you work for?

A. I worked for the City of Apple Valley Police Department prior to that, for the last 14 and a half years.

Q. And what was your most recent assignment with the Apple Valley Police Department?

A. For the past couple years I've been assigned as the agent in charge of the South Metro Drug Task Force.

* * *

Q. Were you working, then, in your capacity with South Metro Drug Task Force on May 15th of 1984?

A. Yes, I was.

Q. Excuse me, 1994. Excuse me.

A. Yes, that's correct, I was.

Q. And on 1994, on May 15th, did you begin an investigation into potential drug trafficing involving a Melvin Johns, Kimberly Thompson and a Wayne Carter?

A. Yes, sir, I did.

Q. And can you briefly tell the court how you first came upon this case?

A. Actually, it was on my day off. I was contacted at my residence at about 9:40 p.m. that the Eagan officers had

been involved in some preliminary investigation involving some suspected drug transactions.

Q. And specifically, what officer had advised you of that?

A. I spoke with Eagan Police Officer Jim Thielen.

Q. And what information did you receive from Officer Thielen at that time?

A. Officer Thielen told me that he had been approached by an informant who had indicated that there was some type of illegal drug activity occurring over in an apartment building in Eagan. Officer Thielen stated to me that he then, when he received this information, went over to check on the information and saw for himself what he believed to be cocaine being packaged within this apartment building.

Q. Did officer Thielen advise you of how he saw this particular cocaine operation?

A. Yes. He told me that he was standing in the common area, on the lawn of the property, or the apartment building, and looked through the window into the interior of the apartment.

Q. When you indicate that Officer Thielen saw this cocaine operation, did he go into specifics at all as far as what he had seen?

A. Yes, he did. When I spoke with him on the telephone, he told me that he saw small quantities of white, what he believed to be cocaine, being packaged in plastic Baggies and that the Baggies were being cut and tied after the

portions of this white substance was being wrapped up in the Baggie.

Q. Based on your training and experience, is that consistent with the way cocaine is normally packaged?

A. Yes, specifically crack cocaine.

Q. What other information did Officer Thielen provide you regarding what he had found out?

A. He told me that he had witnessed three individuals, two males and a female, involved in this packaging process. He also told me that he received information that a blue 1985 Cadillac parked in the parking lot of the apartment complex may belong to the individuals within the apartment.

Q. Do you recall anything else at all he told you?

A. No, sir, not at this time.

Q. Upon receipt of that information, then, what was your response?

A. I advised him that I would come in to write up a search warrant based on the information he had provided to me for the vehicle and for the apartment unit where he had witnessed this occurring. I also advised him that should the occupants of the apartment leave in the vehicle as described, that that vehicle should be stopped upon leaving.

Q. What did you do next, Officer?

A. I responded to the South Metro Drug Task Force office in order to start the preparation of the search warrants

* * *

Q. And you took some photographs?

A. That's correct.

Q. Take any pictures of the vertical blinds?

A. No, sir, I did not.

Q. Well, doesn't the whole case rest upon whether or not you could see through those blinds?

MR. PROKOPOWICZ: Objection. Argumentative. Relevancy, what the whole case rests on with this particular witness.

THE COURT: Sustained.

Q. Well, you took pictures of other parts of the apartment, correct?

A. Yes, that's correct.

Q. And you didn't take any pictures of the blinds that night which depicted the way they were that night?

A. That's correct.

REDIRECT EXAMINATION

By MR. PROKOPOWICZ:

* * *

Q. Now, you indicated -- or, during the course of the search of the apartment did you also recover a lease agreement?

A. Yes, I did.

Q. And was it for that particular apartment?

A. Yes, sir, it was.

Q. And based upon that lease agreement, who was the person assigned to that particular apartment?

A. The defendant, the female defendant.

Q. That would be Kimberly Thompson?

A. That's correct.

Q. On the search warrant application and the search warrant itself for the particular apartment you indicated -- or, you're also seeking permission to look for papers, invoices, billings, letters, credit cards and other items of identification that would indicate the owner, renter, occupant of the premise or the motor vehicle, ownership or constructive possession of any of the items described above. On your search of the apartment did you in fact do that?

A. Yes, I did.

Q. And outside of that lease agreement did you receive any other of the items I just described for you to indicate who may own or rent that particular apartment?

A. No. That was the only item.

Q. Did you discover during the course of your search of the apartment any pieces of evidence that would indicate that anyone other than Kimberly Thompson resided in that particular apartment?

A. No, I did not.

Q. When I say other items I mean clothing, other, personal effects, shaving kits, things like that?

A. No. Anything we found there indicated that Kimberly Thompson was the sole person that owned the apartment.

Q. And referring you to Exhibit 62A, which is the inventory, in particular, item No. 18, does it indicate what item No. 18 is?

A. Yes, it does.

Q. What is that?

A. That's the powder residue that was suspected of being cocaine that was collected from the surface of the kitchen table.

Q. So you did in fact collect it, bag it and itemize it, is that correct?

A. Yes, I did, sir.

Q. On cross-examination you also discussed some conversations that you had with Mr. Johns, is that correct?

A. That's correct.

Q. And during those conversations did Mr. Johns tell you where he was coming from, where he had been or where he was going to?

A. Yes.

* * *

BY MR. PROKOPOWICZ:

Q. Officer Kallestad, as part of this investigation were you able to make a determination as to the residence of defendant Carter and defendant Johns?

A. Yes. I was.

Q. And how was that determination made?

* * *

A. By viewing their identification cards and by them telling me where they lived.

Q. And the identification cards, were they from -- taken from their person, or how was that recovered?

A. The identification cards for Mr. Johns were taken from inside a zippered pouch on the floor of the car and contained his photo. And Mr. Carter's identification, I can't remember where that was obtained from, but at the time of his arrest it was obtained.

Q. But it did have Carter's name on it and clearly identified it as belong to him?

A. That's correct.

* * *

Q. Officer, based upon your reviewing, then, of the identificationcards of defendant Johns, first of all, where was his place of residence, what city?

A. It was in the state of Illinois.

Q. Do you recall specifically what city?

A. May I refer to my report?

Q. Sure.

MR. COWAN: Without raising the ire of the court, I don't understand the relevance. This goes to the possession, these questions? Because it's been stipulated that Miss Thompson was the lessee of the apartment. And I believe that Johns and Carter, under Olson, would fit into invitees. So if it's standing, I would like to state, too, you know, let the court

know where it's going with these questions because other than that, they're really not relevant to the motion.

THE COURT: I didn't recall than it had been stipulated that Miss Thompson was the sole legal occupant of the apartment here. If it's stipulated that she's the sole legal occupant and no one else had the right, by ownership or lease or any other legal authority, to occupy the apartment, maybe your relevance objection has more meaning. I didn't understand that that stipulation had been made, other than there was a stipulation that she had possession of the apartment as the lessee. But nothing said exclusively hers, that I know of.

MR. COWAN: Our stipulation is she's the exclusive leaseholder. And our position is that under Olson, which is a Minnesota case which has gone to the Supreme Court, that Carter and Johns are invitees and share the same standing as invitees of Miss Thompson in that apartment, and that they are there with her. And we know that because of what the police tell us, you know, that Carter and Johns were there. But our stipulation was that she was the exclusive leaseholder.

* * *

BY MR. PROKOPOWICZ:

Q. Based on your investigation involving the investigations of the matters we've discussed, what was the residence of defendant Carter?

A. That was in Chicago, Illinois.

Q. And likewise, regarding the defendant Johns, based upon your review of identification cards and such, what was your determination as to the residence of defendant Johns?

A. He also lived in Chicago, Illinois.

* * *

MR. PROKOPOWICZ: Call Officer Thielen next, Your Honor.

THE COURT: Step over here and be sworn, sir,

JIM THIELEN,

was called as a witness and, having been first duly sworn, was examined and testified as follows:

THE CLERK: For the record, would you state your full name, spelling your last?

THE WITNESS: Jim Thielen, T-h-i-e-l-e-n.

* * *

DIRECT EXAMINATION

BY MR. PROKOPOWICZ:

Q. Officer Thielen, can you begin by telling the court what you do for a living?

A. I'm a licensed police officer for the City of Eagan.

Q. And how long have you been a licensed police officer, approximately?

A. Seven years.

Q. And how long with the City of Eagan?

A. Seven years.

Q. And what is your current assignment with the Eagan Police Department?

A. I'm a patrol officer.

Q. How long have you been a patrol officer, approximately?

A. Seven years.

Q. Were you working in that capacity back on May 15th of 1994?

A. Yes, I was,

Q. And during the evening hours of May 15th of 1994 did you come into contact with an individual regarding some drug activity?

A. Yes, I did.

Q. Can you tell the court approximately what time of the day that was?

A. It would have been about 19:30 hours, 7:30 p.m., in that area.

Q. And do you recall whether it was light or dark out at that time?

A. I believe it was just starting to get dark at that time.

Q. And where were you located when you received this information?

A. I was located at Fire Station One on Rahn Road.

Q. What were you doing at that location at that time?

A. At that time I was running stationary radar.

Q. Was anybody with you at that time?

A. No.

Q. Can you briefly describe for the court what happened at that point?

A. I'm running stationary radar, individual pulls up in a vehicle, gets out, approaches my pass -- or, excuse me, my driver's side and tells me that he feels there's drug activity going on in the apartment complex across the street.

Q. Prior to that had you ever seen this individual before?

A. No.

Q. Did you know his name or reputation or anything before?

A. Nothing at all.

Q. How long did this conversation last with this particular individual?

A. We probably talked anywhere from 15 to 25 minutes.

Q. And what specifics did he tell you regarding the drug activity?

A. He told me that at 3943 South Valley View, Apartment 103, he believed there was drug activity going on. And he noticed through the window from outside that there were people sitting around a table and there was a white powder which he believed to be narcotics on the table.

Q. Did he indicate to you how he saw it from the outside?

A. No.

Q. Did he indicate to you what he actually saw besides just white powder?

A. The individuals, he said, were bagging it up, bagging the white powder up.

Q. What other information did he provide you, Officer?

A. He also told me, a little bit later, that there's a vehicle that possibly belonged to the individuals in the apartment.

Q. And did he describe that vehicle to you?

A. He told me it was a four-door blue Cadillac with Illinois plates, and he gave me the license plate number.

Q. Did you subsequently locate that vehicle in the parking lot?

A. Later on I did, yes.

Q. Can you describe for the court where you were located in relationship to where the supposed drug activity was going on?

A. Where -- When he first told me?

Q. Where this fire station is, when he was relating where the drug activity was going on.

A. Okay. Rahn Road runs basically north and south and I was on -- at Fire Station One, which is right on Rahn Road. The apartment complex is directly across Rahn Road, on the west side of the road.

Q. Is there an entrance and an exit to that particular apartment complex?

A. There's only two entrances and exits.

Q. Where were you in relationship to those exits?

A. It would have -- I was on -- It would have been directly across from South Valley View, which is one of the entrances that goes into the complex.

Q. In relationship to the other exit, did you see that at all? Could you see that?

A. I could not see it from where I was at, no.

Q. Could you see the vehicle at all from where you were located?

A. No.

Q. Did the -- this individual discuss with you whether or not he observed any weapons, or were there any weapons involved at all?

A. He did not discuss at that time, no.

Q. You indicated at that time. Did he later discuss that with you?

A. Yes, he did.

Q. When did that occur?

A. That was after -- after I went up to the apartment, saw what I saw and came back. So it was probably half-hour, 40 minutes later.

Q. You indicated you went to the apartment then?

A. After the initial contact. After I talked to him for 20 minutes or so I told him to wait where I was -- or, where he was and pull his car behind the building, and I told him I'll be back. I was going to go check on the apartment that he was referring to.

Q At this point in time, when you decided to check on the apartment, was it light or dark out?

A. It was dark. It was getting dark at that time.

Q. This would have been approximately around eightish?

A. Somewhere in there, probably a little later even.

Q. And can you describe for the court how you approached the apartment?

A. I drove down South Valley View and I parked at the 5357 building, which is another building. It's not joined together, but it's down further. I parked there and I walked up to the building, to the complex he described, the 43 building. And I came from the west and walked east, up towards the window.

Q. And why did you walk up towards the window?

A. He told me it was a ground -- Well, I know the complex and I knew which window he was referring to, as far as where the apartment was. So I knew it was a ground window.

Q. And what happened, then, when you approached the window?

A. I got up to the correct window, which was Apartment 103, and I stood outside. And they had blinds, these venetian blinds. I don't know what they're called. They're horizontal across. Those were pulled, but I was

able to see through those blinds standing outside on the yard.

Q. Do you recall whether or not the lights were on or off inside the apartment?

A. There was, what I could see, there was one light on that I could see in the kitchen, above the table.

Q. And when you were looking through the window, approximately how far away were you from the window?

A. It varied. I could be anywhere from a foot to 18 inches.

Q. Did you have to put your hands on the window to peer in at all, or could you just stand there and look and observe what was going on from that distance?

A. I could just stand there and look. I did not have to use a flashlight or put my hands along the window.

Q. And approximately how long did you stand there and observe?

A. Approximately 15 minutes.

Q. Can you tell the court what you observed?

A. Sure. As I was looking through, there were three black individuals sitting at a kitchen table, it was a glass kitchen table and the chandelier light was on above the table. The female was on the far right-hand side, one black male that had very short -- well, I thought he was bald at the time, and had a gray T-shirt, I believe, had his

back towards me, he was in the middle. And the third individual was to his left. He had on reddish bedroom slippers, a gold bracelet. He had a black, I believe it was a baseball cap at the time, on.

What I observed them doing was the middle individual that was, I thought, bald at the time, had a white powdery substance, which I believed to be narcotics, in front of him on the table. He would slide from his right to left this powder, it's small, small amounts of powder, over to the individual to his left, that we'll say had the slippers on. And that individual would take -- I thought it was a credit card or driver's license, a hard plastic card, scrape it to the end of the table, he had plastic sandwich bags, dump them into the plastic sandwich bag, role it up, hand it to the female party across the table. She would snip the ends off the bag and then put it in a pile.

Q. And did you observe this continuously while you were standing there or did they take breaks at all during your observation, or what happened?

A. I was there approximately 15 minutes and they didn't take a break. They worked slow -- I guess slow, I don't know, and saw them do about five, six times.

Q. Were they talking at all?

A. They were talking.

Q. Could you hear anything from outside the window as far as what they were saying?

A. No.

Q. What happened next, then, Officer?

A. After that I went back to my squad and went back to Fire Station One.

Q. Had you located that vehicle by this time that the individual had advised you they may be using?

A. Not at that time, no, I did not.

Q. What happened, then, when you got back to the fire station?

A. I met again with the informant. At this time Sergeant Johnson, my sergeant showed up and I advised him what I had seen and explained to him what happened -- the process of events that took place up to that point.

Q. Did you engage in further discussions at that time with the informant or the individual that had discussed this with you earlier?

A. Yes, I did.

Q. What additional information did you learn as a result of this second conversation?

A. Okay. At this time -- or, first what I did is we talked about the car again. I also -- he also discussed that these parties may be carrying a handgun. And I told them to wait here and I went back to the apartment the same way; drove the squad over there, parked it and I went looking for the vehicle that he described.

Q. And by -- From the time that you returned tack to the fire station, talked with the informant and met with Sergeant Johnson, how much time had gone by, approximately?

A. Okay. So the time -- So after I went -- Repeat it one more time. Which point?

Q. You indicated earlier you talked with the informant for a half-hour, 40 minutes?

A. The first time, right.

Q. You went to the window, waited there another 10, 15 minutes?

A. Correct.

Q. Then you met with Sergeant Johnson and the informant for a period of time. How long was that meeting, approximately?

A. That probably lasted another 15, 20, 25 minutes that we discussed our options.

Q. Then you indicated you went back to the apartment complex to look for the vehicle, is that correct?

A. Yes.

Q. And did you find the vehicle?

A. Yes, I did,

Q. Where was the vehicle located?

A. Where the informant stated. It was parked in front of the 3943 building. And it was parked there facing the building. And it was a large blue, four-door Cadillac with Illinois plates on it. And he also gave me the license plate number. It was a correct number.

Q. And how long did this take, approximately?

A. Ten, 15 minutes.

Q. Then what did you do?

A. I went back to the fire station and told the sergeant that I found the vehicle. At that point we discussed calling the South Metro Drug Task Force to let them know what we -- what we found.

Q. And did you in fact do that?

A. Yes, we did.

Q. And what specifically did you do?

A. There was a little -- We discussed, first, who we were going to call because we're not sure who's on call, and so we start at the top of the list. Sergeant Johnson -- We discussed calling out Kevin, since he was at that time in charge of the team. I got ahold of dispatch to find out if they leave town, if they have a number who we're supposed to call at first. They told me try Dan Gilbertson first, a member of the team. I think he was second in charge at the time, I'm not sure.

Q. Did you in fact attempt to contact Officer Gilbertson?

A. Yes. They gave me his pager number and I paged him.

Q. I assume eventually he did call back?

A. Yes, he did.

Q. Okay. And what was his response or what did you discuss?

A. I just basically told him brief synopsis of what we had. He said that he could not come out--he had been drinking at the time--so try Kevin Kallestad.

Q. Did you in fact do that?

A. Yes. I believe Sergeant Johnson finally made contact with him.

Q. And approximately how long did this take, this scenario back and forth through dispatch and pagers and all that?

A. Probably 15 minutes or so.

Q. Did you in fact have conversations, then, with Officer Kallestad?

A. Yes, I did.

Q. And who was present besides yourself -- First of all, how are those conversations conducted? Directly, phone, or how?

A. It was by phone.

Q. And you are still at the fire station at that time?

A. Yes.

Q. And who else is present with you at that time?

A. Just the informant.

Q. And where was Sergeant Johnson?

A. He went -- I told him to go over to North valley View and watch that location in case the vehicle left. I could see where I was, South Valley View.

Q. Did you advise Officer Kallestad of the information you received from the informant?

A. Yes, I did.

Q. Did you advise Officer Kallestad of your personal observations?

A. Yes.

Q. Including what you discovered when you went to the window?

A. Yes.

Q. And what was Officer Kallestad's response?

A. He informed me that if the vehicle leaves, to stop and secure the vehicle.

Q. Did he tell you whether to search the vehicle or not?

A. No. Stop, secure it.

Q. Did he indicate to you what he was planning to do with the vehicle or the occupants?

A. What he was going to do -- because it took him a while to get up there, he told me that he would draft up a search warrant for the vehicle.

Q. What happened next?

A. At that point we basically waited until the car finally -- until the car finally moved.

Q You say the car, you mean the suspect car with the Illinois plates?

A. Yes, the suspect vehicle.

Q. What happened at that time?

A. At that time Officer Johnson informed me that he observed two males put a bag into the car, a couple bags into the car, and they were ready to leave, so I got in my car. And I was parked on the south side of Fire Station One waiting for them to come out. Officer Johnson then told me that they were coming down South Valley View, at which time I spotted them as they were coming out to South Valley View and Rahn Road.

Q. What did you do then?

A. At that time I pulled up behind him, waited for another squad to arrive, and I activated my emergency lights at the intersection of Dick -- correction, Rahn and Beau de Rue Drive.

Q. What happened then?

A. Vehicle pulled over. Pulled off to the right, pulled over. I got out of my car, walked up with my gun out. Officer Johnson and Officer Nelson at the time were there, walked up on the passenger's side, with their guns out also. I got up to the driver's side, I ordered them to put their hands -- both of them, and the passenger on the dash, which they did. And I told the driver to turn the car off and step out of the car.

Q. Did you recognize those individuals at that time?

A. Yes, I did.

Q. Who did you recognized them as?

A. I recognized the driver as the middle person in the apartment complex.

Q. That you had seen possibly doing the drug activity?

A. Correct.

Q. Did you recognize the other occupant of the vehicle?

A. Yes, I did. I recognized him as being the male party on the left side that was bagging the white substance.

Q. You indicated you and the other officers had your guns drawn. Why did you have your gun drawn?

A. Any time I deal with drug activity, that I believe to be drug activity, I know that there's a gun, involved -- or, there's a high probability that a gun will be involved, I'll have my gun out.

Q. As you approached the vehicle, then, with your guns drawn, what happened?

A. Tell them put their hands on the dash, turn off the car. Driver steps out, get him back, the rear of the car. The passenger was still held at gunpoint. I believe it was Officer Nelson, Sergeant Nelson then searched the driver, handcuffed him and I believe they put him in Officer Nelson's squad.

Q. What happened then?

A. I went around to where my partner Officer Nelson was, we opened up the door, it was unlocked, the passenger door, the front --

Q. Why were you opening up the door?

A. We were going to get the passenger out of the car.

Q. Go on, Officer.

A. We told him to keep his hands where we could see them. He stepped out of the car. I recognized him as being the party in the apartment. He still had the gold bracelet on, he still had slippers on. And he stepped out, Officer Nelson then searched him and cuffed him. As he stepped out, I could see on the floor right between his legs a small, black leather, zippered type bag or purse and automatic pistol sitting down on the floor.

Q. What happened next?

A. I asked him at that time are there any -- do you have any drugs in the vehicle? And he said he had two ounces of coke, and he wouldn't tell me where.

Q. Was he subsequently taken into custody then, arrested?

A. Yes, he was. And I believe he was put in Officer Nelson's squad.

Q. At that point what did you do?

A. At that point we ordered a tow. Dispatch contacted Officer Kallestad, told him that we had them in custody. And the officers took the two subjects back to the police department.

* * *

Q. Do you know who the vehicle registered to?

A. No, I do not. Right now I do not.

Q. Would that be in the police report at all?

A. Could I check?

Q. Do you have those reports with you?

A. Yes, I do.

Q. To refresh your memory, please look at the reports and see if it's indicated.

A. (Pause.)

Q. Did you find it?

A. I believe so.

Q. Who did the vehicle register to?

A. Sam Dave -- Illinois, Sam Dave George - 896 comes back to a Carter, Wayne T., of 841 East 52nd Street, Chicago, Illinois. And it lists to a '85 Cadillac, four-door.

Q. That's the vehicle you stopped?

A. Yes.

MR. PROKOPOWICZ: May I approach the witness, Your Honor?

THE COURT: You may.

BY MR. PROKOPOWICZ:

Q. First of all, Officer, I'm showing you Exhibit No. 14, ask if you can take a look at that exhibit and tell the court what that is, if you recognize it?

A. Well, it's one of the -- I believe it's the 43 building of Valley View apartments.

Q. This is, basically, the building where you allegedly saw the drug activity occurring?

A. Correct.

Q. And is that a reasonably accurate depiction of the building, as far as the size of the building, the type of the building, the number of apartments and the parking lot and like as it was back on May 15th of 1994?

A. Yes.

Q. Officer, I'm next showing you what's been marked as Exhibit 15, ask if you can take a look at that. Do you recognize that particular photograph?

A. Yes, I do.

Q. What do you recognize that photograph of?

A. It's the 3943 building, where the respective drug activity was.

Q. Can you indicate for the court on that particular photograph, as you look at it, where the particular window was that you were observing?

A. As you would walk through the front door of the 43 building, it's the first set of windows to the left as you walk through the door.

Q. And on what level of the building?

A. It's ground level. The windows are ground level, the apartment is underground.

Q. Okay. Now, I notice next to the door there is a smaller window, is that correct?

A. Yes.

Q. Did you look in that window at all?

A. No.

Q. Okay. Then there's another set of larger windows. Are those the windows you're referring to?

A. A set of four windows, yes.

Q. Maybe it you can just display the photograph to the court, and if you can point to the court the window that we're talking about?

A. These are the set of windows. Here's the front door, set of windows. (Indicating.)

MR. COWAN: Do you think he could mark it? For the record, objection.

BY MR. PROKOPOWICZ:

Q. If you can just circle it for the court?

A. (Indicating.)

Q. Officer, showing you Exhibit 16, do you recognize that as well?

A. Yes, I do. Another picture of the building, the 3943 building.

Q. It's a different angle, basically. Shot from a different angle, is that correct?

A. Yes. It's the angle I came in from when I walked up to the building.

Q. You would be looking from the west, basically?

A. Yes.

Q. Is that a reasonable depiction, as far as the lawn, the bushes, the doors, the windows, as it appeared on May 15th of 1994?

A. Yes, it is.

Q. Again, it you could circle on that one the window we're talking about?

A. (Indicating.)

Q. Next, Officer, I'm showing you Exhibit 13, ask if you recognize that?

A. I'd say it's probably the window that I was looking through.

Q. Okay. Can you indicate on that particular photograph where you were standing? And again, if you can just put an X on the side of the window that you were standing on?

A. Okay. Why don't I put it right here.

MR. COWAN: Pardon me. What did the witness say?

THE WITNESS: I'm going to put the X -- I'm mumbling. It's going to be --

THE COURT: You need to speak up, Mr. Cowan and everybody here has the right to hear you, Officer.

THE WITNESS: I'm going to put it to the left of the windows.

MR. COWAN: Didn't you say: Why don't I put it here? Is that what you said?

THE WITNESS: No. I did not.

BY MR. PROKOPOWICZ:

Q. There's a brick portion of the window that kind of sticks out right next to the window, is that correct?

A. Yes.

* * *

Q. In relationship to that brick abutment that comes out on the left side of the window as you look at the photograph, where are you standing as far as which side of that brick abutment?

A. I would be standing -- we'll say in front of it. As it comes out, I was standing in front of it.

Q. On the window side of it?

A. There are different times. At which point? I was standing at -- I moved from the front of the brick and I also moved to the right side of the brick and directly in front of the window.

Q. That was during this ten-, 15-minute time span that you were looking in the window?

A. Yes.

Q. When you initially were standing, where were you initially standing?

A. I was initially standing, when I first peered in, was off to the left, in front of the brick abutment.

* * *

Q. Okay. Initially you indicated you were in front of the brick abutment. If you can point that out, please?

A. When I first came up there to the building I took a position--we'll mark it--I took a position up here. I was standing, I was covered by this brick abutment. Through the 15, ten, 15 minutes I was there I also moved off to this side to get a closer look through the shades or the blinds. (Indicating.)

Q. When you were standing in front of the brick abutment what did you see as far as activity inside the building?

A. At that time I could see the table, which would be -- the kitchen table up over here, with a light on above it, and the three individuals sitting around the table. (Indicating.)

Q. Could you see any of the transferring of this white powdery substance, the Baggie that you described earlier?

A. Yes.

Q. And then you moved a little closer to the window, I think you indicated, is that correct?

A. Correct. I don't know at what time it was, but I did take a step over towards this point --

MR. COWAN: Do you want to mark that?

THE WITNESS: Mark it?

BY MR. PROKOPOWICZ:

Q. Can you mark that with an X and maybe a letter B or something by it for your second position?

A. Okay. (Indicating.)

Q. If you can mark your first position an A?

A. (Indicating.)

Q. So you became directly more in front of the window at that point?

A. Yes.

Q. At that point you also observed the same activity going on?

A. Yes.

Q. Finally, Officer, I'm showing you Exhibit 17, which I believe we can stipulate to is a picture of the same window. Does that accurately depict the view that you would have had as you approached that particular window?

A. Yes, it would have.

Q. It also has blinds, as you can indicate, on that window. Is that the same type of blinds that were on there on the evening of May 15th, 1994?

A. If it's a metal type, it is.

Q. As far as the size, the width of the blind and everything else, does it appear to be the same?

A. As far as I recall right now, yes.

Q. The only difference is they were open, at least one or two of them were open, is that correct?

A. Correct.

Q. Do you recall which ones were open at all?

A. I -- I know we got a lot of pictures. I don't recall right offhand which portion of the blind was open that I could see through.

Q. Okay. Thank you.

* * *

Q. Now, as a police officer for several years with the Eagan Police Department have you had occasion, on routine patrol, to drive by that particular apartment complex and that particular apartment building?

A. Several times a night when I work.

Q. Now, outside in front of those windows that you've previously described to the court there's a lawn area, is that correct?

A. Yes.

Q. You've seen people interact on that lawn area, doing things, walking across it and the like?

A. All the time.

MR. PROKOPOWICZ: I have no further questions.

* * *

CROSS-EXAMINATION

BY MR. COWAN:

Q. Officer Thielen, am I addressing you correctly?

A. Yes.

Q. Officer Thielen, on May 15th, 1994, at 19:30 hours, which is 7:30, you say you were on Rahn Road?

A. Rahn Road, correct.

Q. Rahn Road. And you were running radar?

A. Correct.

Q. And you were approached at that time by a confidential informant?

A. Yes.

* * *

Q. Now, Officer, you say someone drove up at that time?

A. Yes.

Q. Now, in your report, I ask you, does your report mention that somebody drove up?

A. No.

Q. It says you were approached, does it not?

A. Yes.

Q. And it says you were approached by whom?

A. Confidential informant. By an individual who is a C.I., confidential informant.

Q. Could you read specifically what it said, who approached you?

A. I was approached by an individual, by a C.I., who is a confidential informant.

Q. That isn't what it says.

A. What does it say?

Q. It says you were approached by an individual who is my C.I.

* * *

Q. I would like to you read, if you will, "when I was approached."

A. "I was approached by an individual who is my C.I., confidential informant," period.

Q. You identify him as my C.I.?

A. Yes.

Q. So this is your confidential informant?

A. After I talked to him, yes, he was.

Q. You had a relationship with him prior to that date, did you not?

A. No, I did not.

Q. You never saw him prior to that date?

A. No idea who he was.

Q. There was no complaints about the building on Valley View, about drugs during the month of May? May.

A. Several complaints about that complex, yes.

Q. You had an ongoing investigation relative to that building, did you not?

A. No, I did not.

Q. Did you not tell Kevin Kallestad that during the month of May, several weeks, you had had complaints, specifically from your confidential informant, telling you about drug activity in that building, specifically Apartment 103 were Kimberly Thompson resided?

A. Not that I recall, no.

Q. So when you called him my C.I., instead of citizen or cooperating individual, there's no particular reason for that?

A. I did not want to use his name.

Q. But you could have called him a citizen, correct?

A. Sure, could have called him a citizen also.

Q. You could have called him a C.I., there is also cooperating individual, that protects his anonymity, right?

A. Okay. Yes.

Q. But you call him confidential informant?

A. Yes, I did.

Q. And you called him my confidential informant?

A. Yes.

Q. Now, this was 7:30?

A. Approximately 7:30.

Q. Okay. He drove up?

A. He drove up.

Q. Get out of his car?

A. Yes.

Q. And did he walk over to your car?

A. Yes, he did.

Q. Did he say something to you?

A. Yes, he did.

Q. What was that?

A. He talked to me about some --

Q. No. I asked you, what did he say?

A. I don't have it down verbatim. I can tell you in general what he said, but I do not know exactly what it was.

Q. Tell me it again, what he was.

A. That's what I said.

* * *

Q. He got out of his car?

A. Yes.

Q. He approached you?

A. Yes, he did.

Q. And he said something to you?

A. Yes.

Q. What did he say?

A. He advised me that there was drug activity going on at apartment -- the complex 3943, Apartment 103, South Valley View.

Q. His first statement to you, how long did that take?

A. I don't know.

Q. Can you give us your best guess?

A. His first statement when he approached the car?

Q. Um-hum, about the drug activity.

A. A few minutes.

Q. Okay. And what did you say to him?

A. Okay, then I started talking to him and asking him questions.

Q. What did you ask him?

A. Some stuff. I'm not going to reveal what I asked him, that would identify my confidential informant.

Q. I don't want you to identify him.

A. Okay.

Q. Did you ask him who he was?

A. Yes, I did.

Q. Did you ask him for identification?

A. Yes, I did.

Q. Okay. Did you ask him anything else?

A. Yes, I did.

Q. What did you ask him?

A. I asked him how he knows this.

Q. And did he tell you?

A. Yes, he did.

Q. What did he tell you?

A. He told me he went past the window and looked inside.

Q. What did you say to him then?

A. And I said -- that's what I asked. I asked: What did you see? And he told me he saw what appeared to be drug activity going on; there's individuals sitting around a table, there's white powder on the table that he believes to be narcotics.

Q. Didn't he tell you that initially?

A. After -- Through our conversation he told us that -- or, told me that.

Q. When he approached the car he told you that?

A. After I talk to him for a while, yes.

Q. How long did you -- How long was it before you learned from him fully what he had seen and how he had seen it?

A. I don't know.

Q. Would anything refresh your recollection?

A. Not right offhand, no. I don't know, we had a conversation, we talked. There was stuff that we talked about, and I don't know.

Q. Well, could it have been five minutes?

A. Probably longer.

Q. Could it have been ten minutes?

A. Sure.

Q. Okay. And after speaking with him you were at the fire station, were you not?

A. Yes, I was.

Q. And you were alone?

A. Yes.

Q. You then went over, after speaking with him, from the fire station, in your squad car, over to the address, is that correct?

A. Correct.

Q. Okay. Now, you got out of your squad car, correct?

A. At what point?

Q. When you arrived at the building -- May I see the photographs? When you arrived at 3943 South Valley view, where did you go?

A. I didn't park my car there.

Q. Okay. Where did you arrive -- drive?

A. At 5357 building, farther west.

Q. How far away?

A. Another complex that size.

Q. How far in distance?

A. Probably four, five hundred feet.

Q. And you walked four or five hundred feet?

A. Yes.

Q. How long did it take you to get from the fire station to where you parked your car?

A. Couple minutes.

Q. How long did it take you to walk from the building where you parked your car to 3943?

A. Probably about the same. Couple minutes.

Q. And now you're at 3943?

A. Correct.

Q. Okay. And now I'd ask you to look at this picture, Exhibit No. 33, and ask you if that's the outside of the building?

A. Yes, it is.

Q. Okay. And is it a fair statement to say that the front door has an address right above it?

A. Yes.

Q. And that --

* * *

Q. There's an address right above it?

A. Correct.

Q. And leading to the door where the address is, right before it is a sidewalk?

A. Yes.

Q. Access to the door?

A. Yes.

Q. Is there any access off this sidewalk leading to any of the garden apartments?

A. No.

Q. Okay. And is there a bush in front of the windows of 3943, garden apartment?

A. Yes.

Q. As a matter of fact, aren't there several bushes?

A. Well, they're back from the windows, yes.

Q. This one particularly is placed in front of 3943?

A. It's there, yes.

Q. In front of the windows. And it's about two feet away, isn't it?

A. I don't recall.

Q. Will anything refresh your recollection?

A. Could be two, could be four feet away. You can't tell from the picture how far it is away from the window.

Q. And the other side, across this yard area, this grassy area, there's trees planted and everything in there, right? Bushes?

A. There's shrubs and trees, yes.

Q. And right across from there there's another doorway, just like 3943? Right across over here there's another doorway for the other garden apartment, isn't that correct? (Indicating.)

A. 3947, yes.

* * *

Q. Okay. Now, you went over to that address now, is that correct?

A. Yes.

Q. And you left the sidewalk area?

A. I was never on the sidewalk area.

Q. You walk over -- There was a place to park cars there on the side, right by -- next to the doorway, isn't that correct?

A. There is -- Correct.

Q. And there's those yellow things that stop you from rolling over?

A. There is several of them, yes.

Q. So you walk over those?

A. No. I did not.

Q. How did you get to where you --

A. I stated earlier I came in from the west side, the 5357 building.

Q. So you came across the grass?

A. Correct.

Q. Now, there's a sidewalk leading to -- 3947, is it? It's the same building?

A. Correct.

Q. So there's two sidewalks that lead to the two front doors?

A. Yes.

Q. And there's no other access to any other doors in front of that building, isn't that correct?

A. Yes.

Q. Okay. So you left the access areas, that is, the two sidewalk areas, or you walked across one of them to get to the windows of 3943?

A. I walked across the 47 -- 3947 one.

Q. And you walked directly in front of the windows of 3943, correct?

A. I walked up to that window, yes.

Q. You walked up to the window. And you made this mark, did you not? (Indicating.)

A. Yes, I did.

Q. Okay. So here's -- for purposes of the -- of your identification, you put an A and a B?

A. Yes.

Q. Okay. Now, the B portion here you put right on the bricks?

A. I was asked to put a mark in the general area where I was.

Q. I know. I know.

A. Okay.

Q. And you out it right on the brick. The B is on the brick, is it not?

A. Only -- If I would have put it in the shaded part, you wouldn't have seen it, so I put it closer.

Q. So you weren't standing where the B is?

A. I was not standing exactly where the B was, no, sir.

Q. Were you close to the B?

A. I could have been close to the B, yes.

Q. You could have been close to the B?

A. The B was asked for me to put -- I was asked to put the B there, my second place I took a vantage point. So I put the B in a rough general area where I was. I could have been six inches either way. I could have been, you know, back further. That was where I put it.

Q. You were pretty close up to the window?

A. I was close to the window.

Q. Were you at any time six inches from the window, that is, your eyes?

A. I was not that close.

Q. Were you at any time less than a foot close to that window to peer to look in?

A. Possibly.

Q. And you see the -- I'll show you these pictures. See these shades?

A. Yes.

Q. Now, those shades were up, were they not? I mean, those shades were there, there were shades?

A. Yes, there were shades. Correct.

Q. Okay. And --

MR. PROKOPOWICZ: Your Honor, state would ask for clarification. We're talking blinds, not shades.

MR. COWAN: Pardon me.

BY MR. COWAN:

Q. There were these what you call vertical -- excuse me, horizontals, horizontal blinds, right? That means that there's individual laths that go down the blinds?

A. Yes.

Q. And they were on the window at that time?

A. Yes, they were.

Q. And you're saying they were open?

A. No, I'm not.

Q. What are you saying?

A. I'm saying part of one of them was open.

Q. Are you saying -- I'll show you what's been marked Exhibit No. 23, and are you saying that -- See this opening in between the two shades? (Indicating.)

A. Yes.

Q. Is that what you mean by open?

A. Part of -- Part of one of the shades was open, yes.

Q. You mean this opening? (Indicating.)

A. You could see through the shade.

Q. You mean by looking through the shades or the space or gap between them?

A. Looking through a gap in the shade.

Q. So the shades were closed but there was gaps between them?

A. There was an opening in between one of the shades.

Q. So the shades were closed?

A. I'll restate it. The shades were closed and there was an opening between one of the shades.

Q. A gap?

A. A gap, an opening, sure.

Q. I'll show you what's been marked Exhibit 25, it shows another gap. Probably the same type of gap. Is that what you're referring to?

A. Referring to --

Q. When you say you looked through, you're able to see through it because there was a gap where the shade doesn't come quite together?

A. I didn't say that's where I saw through the shades though. You're pointing out there's a gap there and I'm agreeing, yes, there is a gap there.

Q. Is that how you were able to see?

A. I'm not sure if I saw through the gap or if there was an opening right next to the gap. But there was a gap in the shades that I looked through.

Q. I'll show you -- this is taken real close. Here's a closer one, People's Exhibit 39. Are you saying that you were able to look through one of the laths here, or the gap that I'm telling you about?

A. It could have been one of the laths, it could have been the gap.

Q. You don't know which?

A. I don't recall right now, no, I do not.

Q. Now, you say that when you got there it was dark?

A. I believe it was dark at that time. Yes, it was.

Q. How dark?

A. It was dark. I mean, there's different darknesses.

Q. Right. Well, was it midnight dark?

A. Not if there was a full moon out.

Q. Well, there wasn't a full moon that night, as a matter of fact.

MR. PROKOPOWICZ: Objection, Your Honor.

THE COURT: Sustained.

BY MR. COWAN:

Q. Was it dark out like it gets when it's 11 o'clock at night?

A. Could have been.

Q. Okay. What time were you looking through the window? If the fellow approached you at 7:30 --

A. Um-hum.

Q. -- spoke with him for about ten minutes, you drove down, two minutes, walk back, two minutes, that's 14 minutes, and then walk across and walk up to the window. That's around 15 minutes, right? Give or take?

A. Sure.

Q. So you're there at about quarter to eight looking through the window, correct?

A. No.

Q. Where am I incorrect?

A. As I stated earlier, I spoke to the individual at the scene, when he first approached me, for about 15 to 20 minutes. We were discussing before I went over to the complex.

Q. I know you said that.

A. Okay.

Q. Okay. I won't argue. So it was dark enough that people had their lights on in the building?

A. Yes.

* * *

Q. Did you know, Officer, that the sun sets the same time of every day of every year of each year? In other words, if it sets at 8:35 p.m. of May 15th of 1994, that's the time it will set in 1995. And, consequently, each day when the sun sets at a specific time you can count on it the next year as setting at the same time and you can count on the same amount of twilight. Did you know that?

A. No.

* * *

Q. You observed for 15 minutes at the side of the window at 3043 Valley View?

A. Apartment 103, yes.

Q. And after 15 minutes you left?

A. Correct.

Q. And while you observed you were close enough to the window that you were able to see one of the people inside the apartment wearing red slippers, is that correct?

A. Yes.

Q. And after the 15 minutes you left and went back to the fire station?

A. Approximately 15 minutes, correct. Yes.

Q. Okay. And once at the -- Strike that.

When you went to look at 3943 you went alone, is that correct?

A. Yes.

Q. And when you went back to the fire station your confidential informant was still there?

A. Yes.

Q. And you stayed and spoke with him for anywhere from 15 to more minutes?

A. Correct.

Q. How much? Could it have been a half-hour?

A. It could have been, yes.

Q. Could it have been 40 minutes?

A. Possibly.

Q. Could it have been longer?

A. That would be pushing it.

Q. Okay. And after speaking with him for the 40 minutes, you then called Trent Johnson?

A. No, Sergeant Johnson arrived just after, a little bit after we talked to him. After I was talking to him, he stopped by Fire Station One.

Q. Just so I'm clear, you spoke to the confidential informant, parked your car, walked back, walked across the grass, went to the window, watched for 15 minutes, went back to the fire station where your confidential informant was. Was Trent Johnson there then?

A. Not right then, no.

Q. Not right then. You began to talk to your confidential informant for a period of up to 40 minutes or less. And during that time did you call Trent Johnson?

A. I don't recall if I called him or if he just showed up.

Q. Okay. Now, you spoke, now, with Trent Johnson about what to do, is that correct?

A. I explained what I had, yes.

Q. And how long did you talk with Trent -- Sergeant Trent Johnson?

A. Maybe five, ten minutes.

Q. And you and Sergeant Trent Johnson decided to do something, is that correct?

A. Correct.

Q. And that was to make a phone call, is that correct?

A. That was to make a couple phone calls, yes.

Q. And how long did these phone calls take, to make them?

A. There was several made. Could have been anywhere from 15 to 20 minutes, 25 minutes.

Q. You eventually got to speak with Kevin Kallestad?

A. Yes, I did.

Q. And how long did you speak with him on the phone?

A. Just a few minutes, from what I recall. I explained the situation to him. And could have been five, ten minutes, I don't recall. I talked to several people.

Q. And you got some advice from him?

A. Yes, I did.

Q. And I believe that was regarding a vehicle?

A. Yes.

Q. And you now left to go find the vehicle?

A. I went back to the apartment complex, yes.

Q. And then you found the vehicle?

A. I found the vehicle.

Q. And then how long did you stay there after finding the vehicle?

A. Just long enough to find the vehicle.

Q. And then you came back?

A. I came back.

Q. How long did that take?

A. I'd say five minutes.

Q. And now what did you do?

A. I got back after I found the vehicle. This time Sergeant Johnson went over to North Valley View to take a position ever there to watch the car.

Q. You sent Trent Johnson at this time back to watch the car?

A. Correct.

Q. And where was the car parked?

A. In the parking lot in front of the building.

Q. Okay. Now, are you familiar with the building of 3943?

A. Yes.

Q. Through 3947?

A. Both of them, yes.

Q. There's two front doors, are there not?

A. Correct.

Q. And there's access doors on another part of the building, is that correct?

A. That I don't recall, if there's an access door, no.

Q. A fire door in the rear?

A. I don't believe so.

Q. From the utility room?

A. You have to get at it through the inside.

Q. So there's no way out, other than these two doors?

A. As far as I recall, there's no other doors going in that building.

Q. And was this 50 minutes after the 15 minutes where you talk with your confidential informant, nobody was looking at 3943 Valley View Drive, Apartment 103, is that correct?

A. Okay, run that by me again. Which point?

Q. Well, you left for -- you observed for 15 minutes?

A. Observed who now?

Q. In the window.

A. Correct. Right.

Q. And then you went back to the fire station?

A. Correct.

Q. And you say you spoke with your confidential informant for around 40 minutes?

A. Possibly, yes.

Q. And then Trent -- Sergeant Trent Johnson showed up and you told him what you had?

A. Right.

Q. For about another ten minutes?

A. Yes.

Q. So for around 50 minutes?

A. Right.

Q. So for that 50 minutes no member of the police department was observing 3943 Valley View Drive, Apartment 103?

A. Correct.

Q. Now, you say that for another 25 minutes after that you're on the phone trying to find out what to do?

A. I've talked to dispatchers. You got to understand, that night was extremely busy.

Q. I understand.

A. And that's why there was nobody watching the building after I left. I was put on hold a couple times.

Q. I understand. Officer. I'm not --

A. It took a while, yes.

Q. So for another 25 minutes the building is unwatched and Apartment 103 is unwatched?

A. The apartment, yes.

Q. You finally, after getting through to several people, get to Kevin Kallestad, which in another approximately ten minutes?

A. Approximately, yes.

Q. And for that ten minutes no one is watching the building from the police department?

A. No.

Q. And you talked to Kevin Kallestad for about five minute or less?

A. Approximately, yes.

Q. For that five minutes no one is watching the building?

A. No.

Q. So for a period of about an hour and a half after your initial 15 minute observation no one is watching that building?

A. Not that I know of.

Q. Or that Apartment 103 or the occupants?

A. Not that I know of.

Q. Or the car?

A. Or the car.

Q. People could have come and gone?

A. Come and gone from where?

Q. People from the apartment could have left the apartment?

A. Yes, they could have.

Q. Without your knowledge?

A. Yes.

Q. They could have taken the white powdery substance that you suspected to be cocaine with them?

A. Yes, they could have.

Q. People came and bought it?

A. Yes.

Q. They could have got in the car with the cocaine, left and came back without your knowledge?

A. Yes, they could have.

Q. After this 90 minutes and your development of a plan with Commander Kallestad, you no longer know that the

cocaine or the powdery substance that you suspect to be cocaine is still in the apartment'

A. No, I do not.

Q. And you don't know if in fact the two individuals who eventually leave and get into the car leave with cocaine?

A. I do not, no.

Q. And when you stopped the car you didn't know that the car contained cocaine?

A. No, I did not.

Q. Or a gun?

A. No, I did not.

A. No, I did not.

* * *

Q. You're operating on what you had previously seen during that 15 minute period?

A. And the information I received from the informant.

Q. Right. Right. Right.

A. Correct.

* * *

Q. You didn't have a warrant signed by a judge to stop that car, did you?

A. No. I did not. I did not have a warrant, no.

Q. One had not been signed by a judge at that time?

A. Not that I know of, no.

Q. Now, you sent Trent Johnson to an area of the parking lot where the car was parked, is that correct?

A. He picked -- I don't know the exact position. He picked an area over in that area, yes.

Q. But your instructions were to watch that car?

A. Watch, yes, so that it would not leave.

Q. He reported back to you, did he not?

A. Yes, he did.

Q. And he reported back to you that at approximately 22:30 hours two black individuals came out of 3943 and got in that car?

A. Yes, he did.

Q. Okay. And they drove down Valley View?

A. South Valley View.

Q. South Valley View. And got on Rahn?

A. Rahn Road.

Q. Rahn Road. And went some distance on Rahn Road?

A. About a block.

Q. And you were stationed at the lip of Rahn and Valley -- South Valley View? You were near the fire station?

A. I was in the parking lot of the fire hall.

Q. So you saw them come by?

A. Yes. They came out of South Valley View.

Q. You went after them?

A. I went after the car, yes.

Q. And you stopped their car?

A. Yes, I did.

Q. So you would have stopped their car at around what time?

A. 22:36.

Q. That's when you had your gun out?

A. Yes.

Q. And you got one of the people out?

A. I got the driver -- I took the driver out first.

Q. And you went back -- By then another officer is on the street, Mason or Nelson?

A. There were approximately three to four officers. I didn't stop the car by myself, no.

Q. But you were the officer who discovered the gun as well?

A. Yes.

Q. Okay. And then they're placed under arrest?

A. Yes, they were.

Q. The car is towed?

A. The car was towed.

Q. And what happens next?

A. They're all -- They were brought up to the station. I followed the car as it was being towed up to the station, as it was being put in the garage. I went inside the cell area. At that time Kallestad arrived and we discussed what we were going to do. I then -- Kevin said let's see if they want to answer any questions. We took each one individually. I read them their rights and Kevin proceeded to interview them.

Q. What time was this?

A. It was probably about 23:10 or so, ten after 11.

Q. And what happened next?

A. After they were interviewed?

Q. Yes.

A. They were released to Dakota County sheriff's officers.

* * *

Q. Is that correct, Officer?

A. Okay. Are we talking about the blinds or the apartment?

Q. The blinds. You know, the pictures I showed you?

A. Okay.

Q. You said you were able to see through gaps?

A. Correct.

Q. Would those pictures be an accurate depiction of the way the blinds were on the night of this incident?

A. Possibly.

Q. Do you want to take a look?

A. (Pause.)

Q. That's inside. (Indicating.)

A. Is there a bedroom?

Q. I guess so.

A. Okay.

Q. Those are the car. (Indicating.)

A. Okay. Okay, I've looked at them.

Q. Are they an accurate depiction of the way the coverings of the window were situated the night of the incident?

A. Okay. The coverings could have been adjusted for the pictures. As stated before, that there's a gap there, there's a gap. Either this gap or a gap in the blinds. Okay? I don't see a gap in the blinds, if that's where I saw through. So everything else -- As far as there's no furniture, we already talked about that.

Q How about the way the shades looked on the window? Did they look that way the night you were there, this incident occurred?

A. Most of the shades -- Right. You cannot see on the shades. There were a couple of them you could not see through at all, correct.

Q. All were closed, however?

A. All attempted to, they were closed.

Q. But there was a gap?

A. Yes.

* * *

Q. The area that you stood on when you looked through the window is a grassy area, dirt and grass?

A. Yes.

Q. You said that you saw people on previous occasions on the grassy area, when you went by that area in the past?

A. Several, yes.

Q. Okay. Those are the people that live there?

A. Some are, some aren't.

Q. There are no signs on that grass which invite people to use it as public facility, is that correct?

A. I've never seen one, no.

Q. There are no swings there?

A. Not on that section, no.

Q. And there's nothing of recreational invitation, shall we say, there, like a swimming pool or sandbox?

A. Not there, no.

Q. But you've seen people walk on that grass?

A. Lots of times.

* * *

Q When you say you've seen both kinds of people, people who live there and people who don't live there walk an the grass --

A. Yes.

Q. -- how do you know they don't live there? How do you know they live there?

A. This apartment complex is probably one of the worst ones we have in Eagan. I've worked it for six years. I have stopped hundreds of people in that apartment -- in that area. We get called there for domestics, loud parties. People come and go all the time. So I know personally that not all of them live there.

Q. You've questioned them and they've told you I don't live there?

A. Yes.

Q. What have you told them?

A. I ask them where they belong.

* * *

REDIRECT EXAMINATION

BY MR. PROKOPOWICZ:

Q. Officer, this apartment complex is an adult only, family complex? What is it?

A. Family.

Q. It's common to see children running around and the like?

A. If you don't, there's something wrong. Yes, it is.

Q. In fact, Officer, showing you Exhibit 33, there's children in that picture, isn't there?

A. I see two of them and an adult.

Q. That's right outside the building we're talking about, is that correct, 3943 door?

A. Correct.

Q. In fact, one of those children isn't even on the sidewalk, are they?

A. No.

MR. COWAN: Can I see the picture?

MR. PROKOPOWICZ: (Hands exhibit to counsel.)

BY MR. PROKOPOWICZ:

Q. Showing you Exhibit No. 15, Officer, again, that's another photograph of that particular building, is it not?

A. 3943, correct.

Q. And basically that's the entryway we're talking about, is that correct?

A. For that building, yes.

Q. In fact, right next to the window that you circled you were looking through there's a bicycle, is that correct?

A. Yes, there is.

Q. And that bicycle isn't on the sidewalk or cement area, is it?

MR. COWAN: I'm sorry, I don't see it.

MR. PROKOPOWICZ: (Indicating.)

A. No, it's not.

BY MR. PROKOPOWICZ:

Q. It's right next to the window you were looking at, is that correct?

A. Yes.

* * *

Okay. It's not the best. But what we have, front door is here, kitchen is just to the left, if you take a right, you go down to the bathroom and a couple bedrooms, the closet down the hallway. You walk straight through -- this should probably be here. You walk right into the

living room. This whole area in here is living room. And the window that I was looking through, this is one right here. This is that small, one pane window. Here's that four-pane window. And the dining room where they were sitting is right here. And that goes into the kitchen and back out the door. (Indicating.)

Q. Can you indicate with an X where you were standing when you initially observed the activity inside the apartment?

A. Okay. That was that brick abutment that comes out next to the window, and I would have been standing along side that.

Q. Can you put an X there?

Q. And then later you moved more towards the middle of the window, is that correct?

A. I probably went not quite to the middle.

* * *

Q. You were inside the abutment at one point?

A. When we went back with the search warrant, yes.

Q. No, the abutment that you talked about.

A. Oh, here. (Indicating.)

Q. You moved in closer to the window at one point?

A. I could have moved in a little closer. I could have stayed even with it, yes.

STATE OF MINNESOTA
COUNTY OF DAKOTA

DISTRICT COURT
FIRST JUDICIAL DISTRICT

State of Minnesota,

Plaintiff,

vs.

AFFIDAVIT

Kimberly Celeste Thompson,
Melvin Johns and Wayne
Thomas Carter,

Defendants.

Jeff Mohr, being first duly sworn, state and alleges as follows:

1. That he is one of the attorneys for the Defendants.

2. That an issue at the suppression hearing involved the expectation of privacy of the occupants of an apartment. That a set of keys to the apartment were in the possession of Defendant Wayne Carter when he was arrested and were inventoried and taken into possession by the Dakota County Sheriff's Department.

3. That the keys were released by the Sheriff's Department, the record of this release was not in the materials turned over to the Defendants by the prosecutor.

4. That the control and possession of the keys is material to the expectation of privacy issue before the Court.

FURTHER YOUR AFFIANT SAYETH NOT.

Dated: 9-29-94 /s/
Gordon G. (Jeff) Mohr

Subscribed and sworn to before me
this 29th day of Sept., 1994.

/s/ Janice M. Godwin
Notary Public

JANICE M. GODWIN
NOTARY PUBLIC-MINNESOTA
HENNEPIN COUNTY
My Comm. Expires 9/24/98

Exhibit 8

Exhibit 9

Exhibit 10

Exhibit 11

Exhibit 12

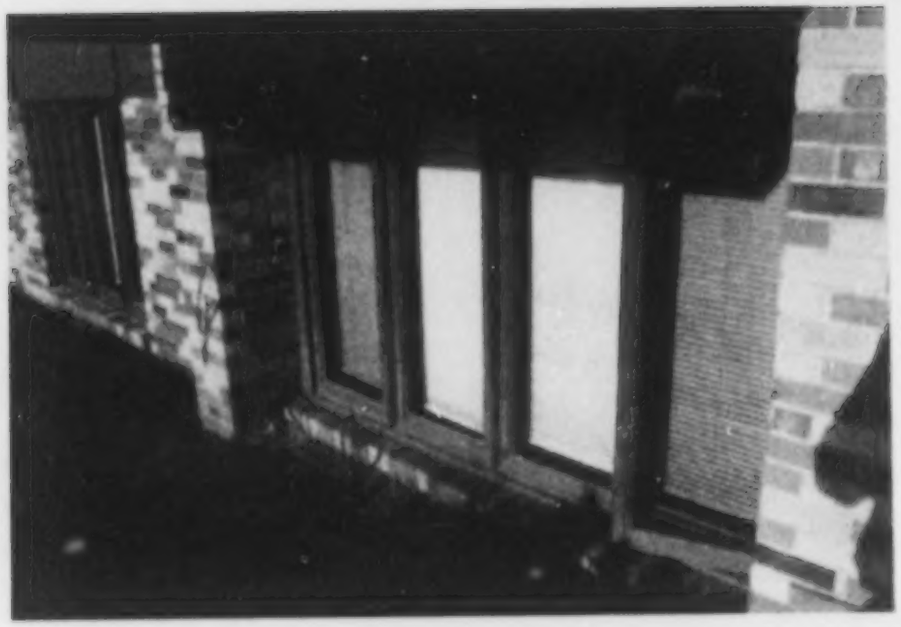

Exhibit 13

Exhibit 15

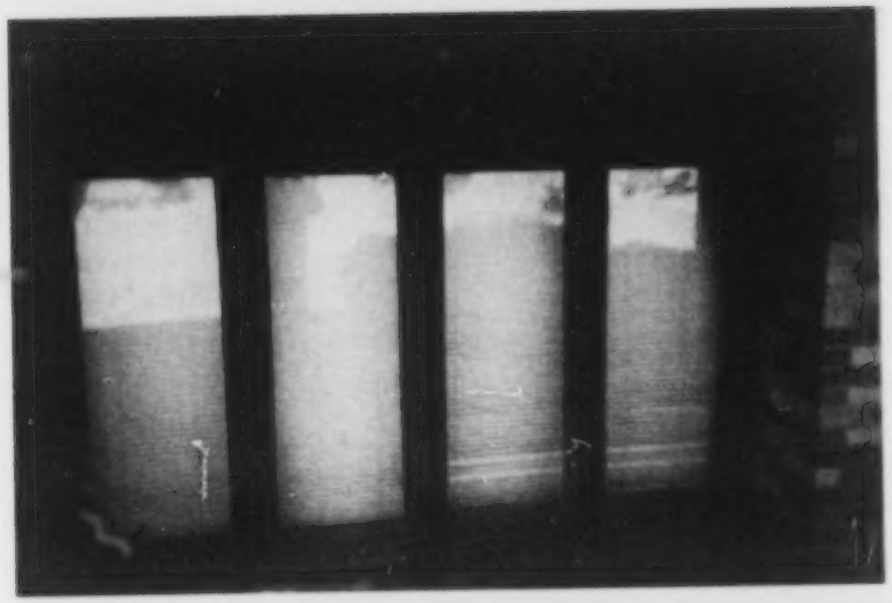

Exhibit 30

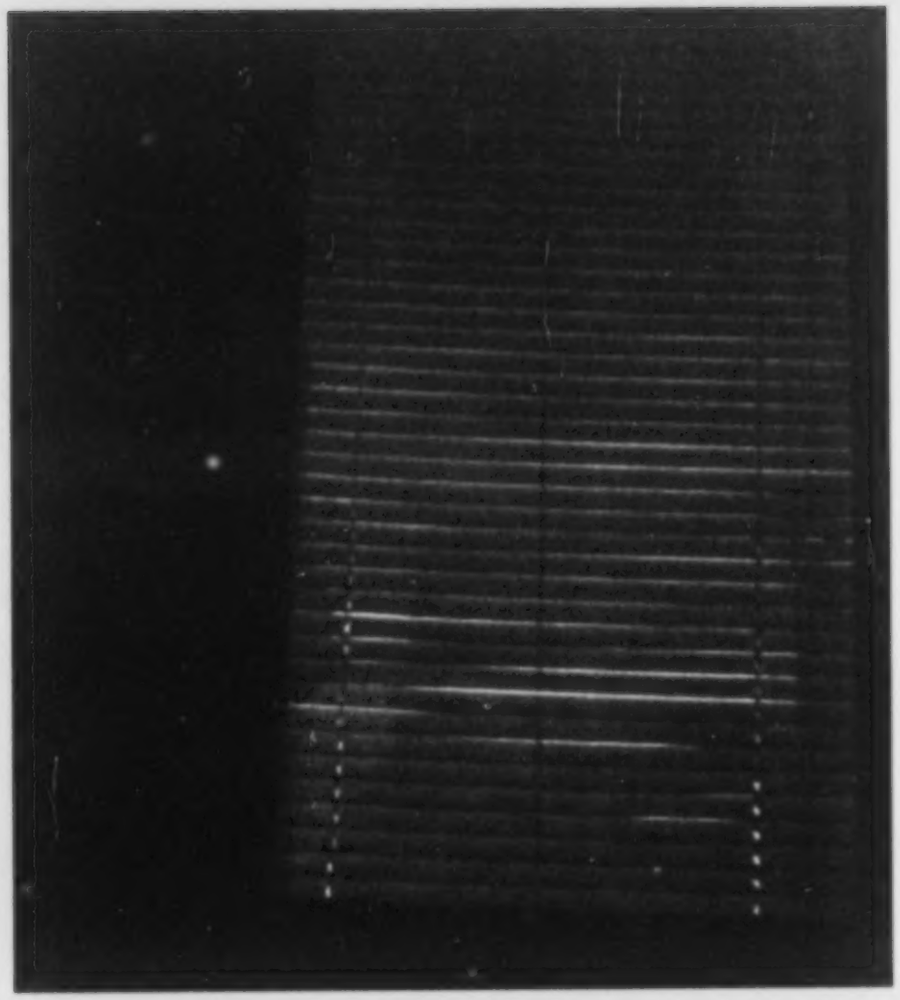

Exhibit 39

Exhibit 42

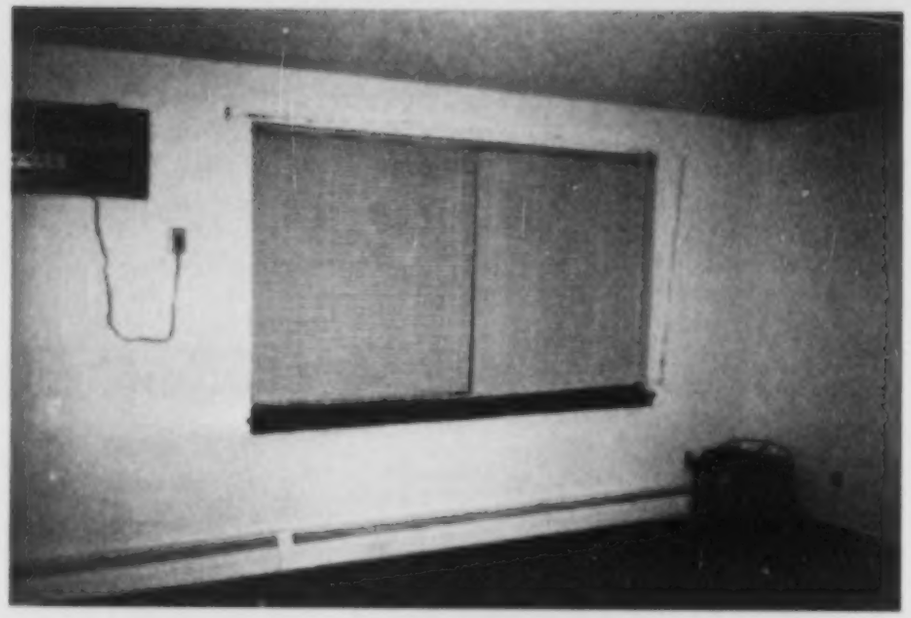

Exhibit 44